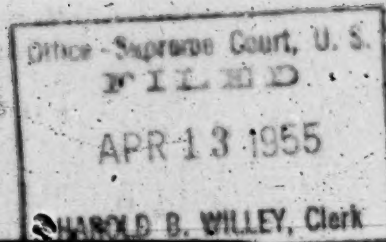


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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1954

No. ~~718~~ 418

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,  
*Petitioner,*

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD.

Petition for a Writ of Certiorari to the United States Court of  
Appeals for the District of Columbia Circuit

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No. ....

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,

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v.

SUBVERSIVE ACTIVITIES CONTROL BOARD.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Communist Party of the United States of America petitions that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit (R. 2172; Appendix A herein)<sup>1</sup> which affirmed (Judge Bazelon dissenting) an order of the Subversive Activities Control Board (R. 138) that the petitioner register as a Communist-action organization under Section

<sup>1</sup> We use "R." to refer to the record from the court below, which consists of the Joint Appendix below and the proceedings in that court. "Tr." refers to the transcript of the proceedings before the Subversive Activities Control Board, filed with this Court by order of the court below and pursuant to Rule 21(3) of this Court. "A. G. Ex." refers to an exhibit offered by the Attorney General in the proceeding before the Board. "C. P. Ex." refers to an exhibit offered in that proceeding by the petitioner herein.

7 of the Subversive Activities Control Act of 1950, 64 Stat. 993, 50 U. S. Code 786.<sup>2</sup>

### OPINION BELOW

The opinion of the court below has not yet been reported. It appears in the record at 2083-2171. The Report of the Subversive Activities Control Board appears in the record at 1-137. It has been published as Sen. Doc. No. 41, 83d Cong., 1st Sess.<sup>3</sup>

### JURISDICTION

The judgment of the court below is dated, and was entered, on December 23, 1954. Petition for rehearing was denied on January 14, 1955 (R. 2199, 2200). Jurisdiction of this Court is conferred by Section 14(a) of the Act and 28 U. S. Code 1254.

### QUESTIONS PRESENTED

1. Whether the provisions of the Subversive Activities Control Act of 1950 as amended, relating to Communist-action organizations and their members, and as supplemented by section 5 of the Communist Control Act of 1954, are unconstitutional on their face or as applied in this case.

<sup>2</sup> The Subversive Activities Control Act, as amended, is hereafter referred to as the Act. It is Title 1 of the Internal Security Act of 1950.

<sup>3</sup> Pursuant to Rule 23(1)(i) of this Court, we have filed with the Court pamphlet copies of the opinion of the court below and of the Report and Order of the Board. References to the court's opinion will be designated "Op." and will be to the pagination of the pamphlet copy. The pagination of the Report of the Board is the same as in the record from the court below, and references to the Report will be designated "R."

2. Whether the court below, having stricken two of the key findings on which the Board based its order, erred in failing to remand the proceeding for administrative re-determination.

3. Whether the order of the Board and the decision below are erroneous because they rest on alleged conduct of petitioner which admittedly was discontinued long before the enactment of the Act.

4. Whether the court below and the Board erroneously interpreted and applied section 13(e) of the Act.

5. Whether the court below and the Board erroneously interpreted and applied the Act's definition of "world Communist movement."

6. Whether the Report of the Board and the opinion below demonstrate on their face that the Board's findings are unsupported by the preponderance of the evidence.

7. Whether the order and findings of the Board are unsupported by the preponderance of the evidence.

8. Whether petitioner was denied a fair hearing because of the extra-legal pressures exerted upon the Board members to decide against petitioner and because of the refusal of the Board to disqualify members Brown and McHale upon petitioner's affidavits of bias and prejudice.

9. Whether the denial by the court below of petitioner's motion for leave to adduce additional evidence violated section 14 of the Act and was an abuse of discretion.

10. Whether the order of the Board should have been set aside because part of the administrative hearing was conducted by "recess" appointees to the Board whose appointments were invalid or had expired under article 2, section 2, clause 3 of the Constitution.

## STATUTES INVOLVED

The pertinent provisions of the Subversive Activities Control Act, as amended, the Immigration and Nationality Act, and the Communist Control Act of 1954, are set forth in Appendix B hereof.

## STATEMENT OF THE CASE

### A. The Act

#### 1. Its Enactment

The Act originated in proposals advanced by the House Committee on Un-American Activities. While the bill was pending, the President sent Congress a special message in which he commented on the bill as follows (H. R. Doc. No. 679, 81st Cong., 2d Sess., pp. 5-6):

"Once a government is committed to the principle of silencing the voice of opposition, it has only one way to go, and that is down the path of increasingly repressive measures, until it becomes a source of terror to all its citizens and creates a country where everyone lives in fear.

"We must therefore be on our guard against extremists who urge us to adopt police state measures. Such persons advocate breaking down the guarantees of the Bill of Rights in order to get at the Communists. They forget that if the Bill of Rights were to be broken down, all groups, even the most conservative, would be in danger from the arbitrary power of the government.

"Legislation is now pending before the Congress which is so broad and vague in its terms as to endanger the freedoms of speech, press and assembly protected by the first amendment. Some of the proposed measures would, in effect, impose severe penalties for normal political activities on the part of certain groups, including Communists and Communist Party-line followers. This kind of legislation is unnecessary, ineffective, and dangerous."

5

The bill was passed, and the President vetoed it. He stated in his veto message (H. R. Doc. 708, 81st Cong., 2d Sess., p. 5):

“Unfortunately, these [registration] provisions are not merely ineffective and unworkable. They represent a clear and present danger to our institutions.”

Congress overrode the veto on September 23, 1950.

## 2. Organizations Covered

The Act provides for administrative proceedings before the Board, upon petitions of the Attorney General, to determine whether or not accused organizations shall be required to register as “Communist-action” or “Communist-front” organizations (Sec. 13). The Communist Control Act of 1954 adds provisions authorizing the Board, on petitions of the Attorney General, to declare organizations to be “Communist-infiltrated” (Secs. 3(4A) and 13A of the Act, added by Sec. 7 of the Communist Control Act). These latter are not required to register, but are deprived of the benefits of the National Labor Relations Act, as amended. The three types of organizations are collectively referred to as “Communist organizations” (Sec. 3(5)).

The definitions of Communist organizations are tied into findings made in Section 2 of the Act. Section 2 finds, among other things, that there exists a world Communist movement, controlled by the Communist dictatorship of a foreign country, which seeks by treacherous and terroristic methods, and through the medium of a world-wide Communist organization, to overthrow capitalist governments and establish in their place totalitarian dictatorships subservient to the foreign dictatorship.

A Communist-action organization is defined as one “which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in Section 2 of this title, and (ii) operates primarily to advance the

objectives of such world Communist movement as referred to in section 2 of this title" (Sec. 3(3)).

A Communist-front organization is defined as an organization which is substantially dominated or controlled by a Communist-action organization and is primarily operated for the purpose of giving aid or support to a Communist-action organization, a Communist foreign government, or the world Communist movement (Sec. 3(4)).

A Communist-infiltrated organization is defined as one which is substantially dominated or controlled by an individual or individuals who are, or within three years have been, engaged in giving support to a Communist-action organization, a Communist foreign government, or the world Communist movement, and is serving, or within three years has served, as a means for giving aid or support to any such organization, government, or movement, or for the impairment of the military or industrial strength of the United States (Sec. 3(4A)).

### 3. Consequences of a Registration Order

A Communist-action organization is required to register as such with the Attorney General. The registration statement must show the names and addresses of the organization's officers and members during the preceding year, give a detailed accounting of all moneys received and expended, including the source of its revenues and the purposes of its expenditures, and list all printing and duplicating facilities. Annual reports must be filed to keep the registration up to date. The registration statement is open for public inspection (Sec. 7).<sup>4</sup>

When a registration order becomes final, as it does on exhaustion of judicial review (Sec. 14(b)), the officers of the organization have an individual duty to register the organization and to list its members (Sec. 7(h)). Mem-

<sup>4</sup> The requirement of listing printing and duplicating facilities was added as section 7(d)(6) by P. L. 557, 83rd Cong., 2d Sess.

bers not so listed are under a duty to register themselves after an administrative determination of their membership (Secs. 8, 13(a)). Failure to comply with these duties is punishable by imprisonment up to five years, fine up to \$10,000, or both. These penalties are potentially astronomical since each day of failure to register constitutes a separate offense. Any falsity in a registration statement is punishable by a similar penalty. Here, too, astronomical accumulation is made possible because each misstatement and each omission is a separate offense (Sec. 15).

The listing or self-listing of members of petitioner in compliance with a registration order has been made an impossible task by Section 5 of the Communist Control Act. That section enumerates thirteen criteria for determining "membership" in the Communist Party. These are dependent on facts of which the petitioner and its officers can have no knowledge, and in addition are so vague and irrational that individuals cannot determine whether or not they are "members".<sup>5</sup>

Any person whose name is listed on a registration statement as an officer or member of, or a contributor to, the organization is in jeopardy of prosecution under the extravagantly vague sedition provisions of Section 4(a) of the Act,<sup>6</sup> as well as under the Smith Act and a host of state laws.

<sup>5</sup> For example, the twelfth criterion of membership is whether the individual "has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes of the organization." Other criteria are no more definite. Furthermore, the irrationality of section 5 is apparent from the introductory clause alone, which establishes identical criteria to prove such divergent facts as "membership" in petitioner, "participation" in petitioner, and "knowledge" of petitioner's purpose or objective.

<sup>6</sup> Section 4(a) makes it criminal to conspire "to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship" under foreign control. And see *infra*, p. 11, for a list of other federal criminal statutes which might be invoked against members of a registered organization.

In addition, the entry of a final registration order automatically makes operative crippling sanctions against the organization and its members. These sanctions apply whether or not the organization registers.

The sanctions are the following:

(1) The organization must label publications and literature which it distributes by mail or in interstate or foreign commerce as being disseminated by a Communist organization, which is defined as a participant in a seditious conspiracy. Its radio and television broadcasts must be announced as sponsored by a Communist organization. These requirements apply without regard to the nature and content of the publications and broadcasts (Sec. 10).

(2) Members of the organization may not hold non-elective federal employment, employment in any privately owned "defense facility," or office or employment in labor unions; nor may they represent employers in matters arising under the National Labor Relations Act (Sec. 5, as amended by Sec. 6 of the Communist Control Act). A defense facility is any establishment listed by the Secretary of Defense on his ex parte determination that the security of the United States requires such listing (Secs. 3(7), 5(b)). Accordingly, what employment is open to members of the organization, and, for that matter, whether any employment at all is open to them, rests in the unreviewable fiat discretion of the Secretary of Defense.

(3) Government employees and employees of defense facilities are prohibited from contributing funds or services to the organization. Accordingly, the ex parte determination of the Secretary of Defense limits, or may virtually eliminate, the sources from which the organization can obtain funds or services (Sec. 5).

(4) Members of the organization may not hold, or apply for, passports (Sec. 6).

(5) Alien members of the organization are excluded from admission into the United States, and if already in the country, must be deported. An alien may not be naturalized if he was a member of the organization within ten years preceding the filing of his naturalization petition. Naturalized citizens who become members of, or who affiliate with, the organization within five years after naturalization are subject to revocation of citizenship.<sup>7</sup>

(6) Contributions to the organization are not tax deductible, and the organization itself is denied tax exemptions. (Sec. 11).

The prohibitions described in the first four paragraphs above are enforceable by criminal penalties of up to five years imprisonment and \$10,000 fine (Sec. 15).

The sanctions on members apply regardless of the personal innocence of the members and their lack of knowledge of alleged illegal or conspiratorial actions or purposes, and though their activities are confined to constitutionally protected areas.

The registration order has still other consequences, as follows:

(1) It officially brands the organization, its members and contributors, as treasonable conspirators, and subjects them to public opprobrium and ensuing social and economic reprisals.

(2) The Act makes it dangerous for other organizations or persons to associate with the proscribed organization or its members or to forward by constitutionally protected means social, economic, or political changes supported by the proscribed organization. Under the Act's evidentiary cri-

<sup>7</sup> Originally contained in Secs. 22 and 25 of the Act, these sanctions have been carried forward by Secs. 212(a)(28)(E), 241(a)(6)(E), 313(a)(2)(G) and 340(c) of the Immigration and Nationality Act, 66 Stat. 163, 8 U. S. C. 1182, 1251, 1424, 1451.

teria of front and infiltrated organizations, an organization which has any dealings with or expresses views similar to those of an organization proscribed as a Communist-action organization or its members, is itself in danger of being proscribed as a front or infiltrated organization (Secs. 13(f), 13A(e)). Moreover, under the sweeping criteria of Section 5 of the Communist Control Act, any person who has any contact or dealings with the Communist Party or its members may thereby be determined to be a member of the Party, become liable to register as such, incur the other penalties for membership, and jeopardize the status of any organization to which he belongs. A registration order therefore puts the organization into a quarantine, depriving it of access to the people and the people of access to ideas propagated by it.

The total impact of the Act is such, therefore, that if the organization registers, it destroys itself and jeopardizes the livelihood and liberty of its members. Furthermore, the organization and its officers incur astronomical criminal penalties for the inevitable "false statements" and "omissions" in registration, which are induced by Section 5 of the Communist Control Act. If a member registers, he destroys himself. On the other hand, if there is no registration, the organization, its officers and members are subject to severe criminal penalties for each day of non-registration.

An organization ordered to register is, therefore, given the illusory choice of organizational and political suicide by registration or governmental execution for non-registration. The registration order does not, and was not intended to, result in registration, which the Act makes an impossible alternative. Its function is to lay a foundation for the imposition of destructive penalties, whether or not there is registration; for mass prosecution of the organization's members, if there is no registration; and for the issuance of similarly destructive orders against other

organizations on findings that they are "fronts" or "infiltrated".

The order is not a means for obtaining the disclosure of information. Its purpose and effect is to outlaw the organization and so to prevent it from disclosing its views to the American people. The Attorney General has acknowledged that the registration order in this case, if sustained, will result in outlawing or destroying petitioner.\*

#### 4. The Act's Predetermination of the Administrative Order

The determination of whether an organization is "Communist", is made administratively by the Board, after hearing (Sec. 13). Provision is made for judicial review by the Court of Appeals and on grant of certiorari by this Court. On judicial review, the Board's findings of fact are conclusive only if supported by the preponderance of the evidence (Sec. 14(a)).

The Act purports to require the registration of Communist-action organizations and their members as participants in a foreign-controlled conspiracy to commit espionage, sabotage, treason, violent revolution, etc., on behalf of a foreign power. The activities claimed to supply justification for the registration requirements are, of course, already punishable under numerous federal criminal statutes,<sup>9</sup> and, if not already punishable, could easily be

\* Hearings before Subc. No. 1 of Comm. on Judiciary, H. R., 83rd Cong., 2nd Sess., April 12, 1954, p. 137; and public statement of Attorney General Brownell quoted in 100 Cong. Rec. 14401. Attorney General Clark, testifying on the Mundt bill, the ancestor of the Act and a far less stringent measure, described the bill as one of "several proposed bills which seek to outlaw communism and the Communist Party." *Hearings on Proposed Legislation to Curb or Control the Communist Party of the United States*, Subc. on Legislation of Comm. on Un-American Activities, H. R., 80th Cong., 2d Sess., on H. R. 4422 and 4581, p. 17.

<sup>9</sup> E.g., the following sections of 18 U. S. Code: 2153-2156 (sabotage); 793-798 (espionage); 2383 (inciting rebellion or insurrection); 2384 (seditious conspiracy); 2385 (advocating forceful over-

made so. The Act thus establishes a mechanism to prosecute accused persons not for their alleged crimes, but for their failure to register themselves as criminals. The explanation for this shift of the locus of punishment from the crime itself to failure to register as a criminal is that the Act seeks to punish Communists as criminal conspirators even though they are not and cannot be proved to be such. The legislative history and the scheme of the Act show that such is its purpose and effect.

The legislative history of the Act discloses the following:

(1) The sponsors of the legislation were bent on outlawing the Communist Party by a legislative fiat determining that it is a foreign agent and requiring it to register as such. The first ancestor of the Act, the Mundt bill (H. R. 4422, 80th Cong., 1st Sess.); would have required the Communist Party by name to register as a foreign agent, without judicial or quasi-judicial determination of the facts. However, the Congress was informed by Attorney General Clark and various constitutional authorities, testifying before the legislative sub-committee of the House Committee on Un-American Activities, that such an approach was probably unconstitutional as fiat legislation violating the due process and bill of attainder clauses. *Hearings on Proposed Legislation to Curb or Control the Communist Party of the United States*, before Sub-Committee on Legislation of the Committee on Un-American Activities, H. R.

throw of government); 2381 (treason); 2382 (misprision of treason); 951 (failure to register as foreign agent); 957 (possession of property of a foreign government for use in violating United States statute); 2387-2388 (undermining loyalty, discipline, or morale of the armed forces); 2386 (failure to register by organizations engaged in civilian military activity, subject to foreign control, affiliated with foreign government, or seeking to overthrow government by force); 1361-1364 (damaging federal property or communications); 1381 (enticing desertion and harboring deserters); 2390 (enlistment to serve against United States).

80th Cong., 2d Sess., on H. R. 4422 and 4581, pp. 19-20, 113, 115, 117, 209-11, 256, 432, 493-95.<sup>10</sup>

Because of these warnings, the Committee on Un-American Activities rejected the crude approach of the Mundt bill and reported the Mundt-Nixon bill (H. R. 5852, 80th Cong., 2d Sess.), which first proposed the scheme of an administrative proceeding to determine registerable organizations. Representative Nixon, Chairman of the legislative sub-committee of the Un-American Activities Committee, and co-author of the bill, explained the reason for the change to the Senate Judiciary Committee (emphasis added):

"From having heard the witnesses before our Committee, we came to the conclusion that naming the Communist Party by name and attempting to build the entire registration provisions around such a definition was an unconstitutional approach and consequently *the committee attempted to find a legislative device for meeting the problem in a constitutional manner.* . . .

*"That is the reason that we do not name the Communist Party."*<sup>11</sup>

The House and Senate Committees also informed the Congress in their reports on the bill which became the Act:

"To make membership in a specifically designated existing organization illegal *per se* would run the risk of being held unconstitutional on the ground that such an action was legislative fiat" (H. Rep. No. 2980, 81st Cong., 2d Sess., on H. R. 9490, p. 5; Sen. Rep. No. 1358, 81st Cong., 1st Sess., on S. 2311, p. 9).

(2) The "problem" to which Representative Nixon referred in his testimony before the Senate Judiciary Committee is also revealed by the legislative history. As Attorney General Clark advised the legislative subcommittee of the Un-American Activities Committee, there

<sup>10</sup> Hereafter cited as *House Hearings*.

<sup>11</sup> *Hearings before Senate Committee on the Judiciary, 80th Cong., 2d Sess., on H. R. 5852, pp. 40, 45-46.*

already existed legislation which required registration of foreign agents and "subversive" organizations (the Foreign Agents Registration Act and the Voorhis Act) and which prohibited advocacy of the overthrow of the government by force and membership in a group of persons who so advocate (the Smith Act). The Attorney General also informed the Congress, however, that the Communist Party and its members could not be proved to have violated these statutes. This caused the House and Senate Committees to conclude that the existing legislation was "ineffectual" and "inadequate": *House Hearings*, pp. 21-22; Sen. Rep. No. 1358, *supra*, p. 7; H. Rep. No. 2980, *supra*, p. 2.

The Act was an attempt to solve the dilemma that to name the petitioner was unconstitutional and to require proof was "ineffectual". While not specifically naming petitioner, the Act guaranteed that petitioner would be ordered to register as a seditious foreign agent without proof of either sedition or foreign agency. This result was accomplished by three devices:

1. The findings essential to guilt are made by the Act, and are not the subject of independent adjudication by the Board.

Under the definition contained in Section 3(3), there can be a Communist-action organization in the United States only if there is a world Communist movement subject to the control and having the objectives described in Section 2. However, the existence and nature of the world Communist movement are not issues left to adjudication by the Board. Instead, these "facts" are found by Congress in Section 2. The findings are then incorporated into Section 3(3) in the form of assumptions of fact which the Board is not authorized to re-examine, but is required to accept as the foundation for its decision.

The correctness of these legislative findings regarding the world Communist movement is also assumed by the eight criteria which Section 13(e) requires the Board to

apply in deciding whether an accused organization is a Communist-action organization. Seven of the eight criteria require the Board to act on the assumption that a world Communist movement exists and has the characteristics found in Section 2.<sup>12</sup>

The respondent admitted in its brief below (pp. 61-62), and the court below held (Op. 55-56), that the Section 2 findings on the existence and nature of the world Communist movement were binding on the Board and the court, and that these matters were not subjects for adjudication.

It is thus undisputed that a determination of key facts which constitute the necessary foundation for a finding that an organization is a Communist-action organization has been made by legislative fiat and is not within the competence of the Board.

Section 2 also predetermines other aspects of the Board's findings. It finds that "the Communist organization in the United States" engages in practices which satisfy the definition of an action organization (2(15)) and has characteristics which satisfy four of the eight criteria which the Board is supposed to apply under Section 13(e). Cf. 2(5) with 13(e)(6); 2(6) with 13(e)(1); 2(7) with 13(e)(7); 2(9) with 13(e)(8).

By legislative fiat, Section 2 thus predetermines virtually all of the elements requisite for the entry of a registration order, including the supposed existence, nature, and foreign control of a world Communist movement, and the exist-

<sup>12</sup> Thus the first of the evidentiary standards of 13(e) is "the extent to which" an accused organization's policies are formulated and its activities performed pursuant to directives or to effectuate the policies "of the foreign government or foreign organization in which is vested, or under the domination or control of which is exercised, the direction and control of the world Communist movement, referred to in section 2." All the remaining standards, except 13(e)(7), refer back to "such foreign government or foreign organization" or "such world Communist movement."

ence, purposes, and characteristics of an organization which it finds to be the domestic agent of that movement.

All that remained for the Board, therefore, was to supply the name of the particular organization which Congress had in mind as the American Communist-action organization referred to in Section 2. As to this there could be no doubt in view of the legislative history previously alluded to and the fact that the committee reports and the debates refer to petitioner by name.<sup>13</sup> Finally, while this litigation was pending in the court below, the Congress, abandoning its previous constitutional apprehensions, expressly named the petitioner as a Communist-action organization (Sec. 4, Communist Control Act).

The court below, ignoring the fact that the Congressional findings of fact basic to the ultimate decision were not left open for adjudication, held that the Act did not pre-determine the Board's order because "Petitioner is not mentioned" (Op. 39).

2. The second device employed by the Act to guarantee the issuance of a registration order against petitioner consists of the evidentiary standards of Section 13(e). The function of these standards is to permit the Board to rubber-stamp the legislative finding that petitioner is a Communist-action organization without proof to that effect.

By the Section 3(3) definition, a Communist-action organization is distinguished by two characteristics: (1) foreign control, and (2) advancement of the seditious objectives attributed by Section 2 to the world Communist

<sup>13</sup> The reports stated: "There is incontrovertible evidence of the fact that the Communist Party of the United States is dominated by such totalitarian dictatorship and that it is one of the principal instrumentalities used by the world Communist movement in its ruthless and timeless endeavor to advance the world march of Communism." House Rep. No. 2980, *supra*, pp. 1-2; Sen. Rep. No. 1358, *supra*, p. 5. The same passage appears in the House Committee Report on the Mundt Nixon bill. House Rep. No. 1841, 80th Cong., 2d Sess., to accompany H. R. 5852, p. 3.

movement. However, none of the criteria which Section 13(e) establishes for the Board's determination (and which were the only criteria applied by the Board) has any relevance whatsoever to the advancement of seditious objectives, and still less to the specific seditious objectives attributed by Section 2 to the world Communist movement.<sup>14</sup> This fact was conceded in the respondent's brief below, which argued that registration could be ordered even though the accused organization's policies are "good" and every act it does is "innocent" (Br. 72). The court below apparently took the same view (Op. 41, 44). Accordingly, Section 13(e) removes from administrative adjudication one of the two components of the Section 3(3) definition.

As to the other component of that definition—foreign control—the situation is hardly better. The standards of 13(e) are vague and irrational criteria for a finding of foreign control. At most they supply a series of nebulous circumstantial and inferential tests which can be satisfied by relevant or irrelevant factors. For present purposes, four examples of the eight standards will suffice.

The "non-deviation" standard (Sec. 13(e)(2)) is irrational because, as the Board held (*infra*, pp. 30-31), it permits foreign control to be inferred from a similarity of the organization's views to those of the Soviet Union even though the views are demonstrably true, widely held by non-Communists, reasonably deducible from the facts, or independently arrived at by the organization.

The "financial aid" standard (Sec. 13(e)(3)) is satisfied merely by evidence of receipt of aid, without regard to those facts which, as the court below recognized (Op. 46),

<sup>14</sup> Only the first two standards of section 13(e) have anything to do with objectives, and neither of these requires proof that the objectives referred to are seditious or evil. The court below recognized that the second standard ("non-deviation") had no relevance to the objectives element of the 3(3) definition (Op. 45).

determine whether the aid is an instrument of control, i.e., the terms and conditions, if any, on which it is extended.

Section 13(e)(5) makes "reporting" proof of foreign control without regard to the nature of the "report", the purpose for which it was given, or its use, if any, by the recipient. Trade unions and business, religious, scientific, cultural and political organizations customarily receive reports at their gatherings as a means of exchanging and sharing knowledge, experiences, and ideas. Under the preposterous theory of this subsection, persons who make reports at such gatherings thereby supply evidence that they and the organizations they represent are "controlled and dominated" by the organization which sponsors the gathering.

Again, Section 13(e)(6) directs the Board to consider "the extent to which" the organization's "principal leaders or a substantial number of its members are subject to or recognize the disciplinary power" of the alleged foreign principal. This standard, aside from relying on subjective attitudes, permits the condemnation of the organization upon proof of the disciplinary status of some of its leaders or members, notwithstanding that they may be an unrepresentative or dissenting minority and that the organization itself is completely independent.

The foreign-control element of the Section 3(3) definition is reasonably definite, and its application requires no subsidiary guides. Therefore, the function of Section 13(e) (in addition to eliminating adjudication of the objectives element of the definition) is to unsettle the ultimate standard by permitting it to be "proved" by irrelevant evidence.

3. In addition to predetermining the essential findings and establishing vague and irrational standards of proof, the Act establishes a Board which is necessarily under compelling pressure to decide against petitioner and whose

members have a personal stake, financial and otherwise, in so deciding.

The Board is set up as a permanent agency, which originally had the sole function of identifying Communist-action organizations, their members, and Communist-front organizations. Since Communist-front organizations are by definition tools of a Communist-action organization, they can exist only if the Board finds that there is an action organization.<sup>15</sup>

The Act (see Sec. 2(15)) and its legislative history contemplate the existence in the United States of only one Communist-action organization, the petitioner. And even if Congress had considered that there might be more than one, it is certain that it believed petitioner to be the principle organization of that character.

It is clear, therefore, that if the Board had decided that the petitioner was not a Communist-action organization, it would have rendered itself functus officio and effectively repealed the Act. For there would be no other organization which could be charged with being a Communist-action organization, and there could be no Communist-front organization.

This circumstance has been recognized by the Board and the Attorney General. The first two chairmen of the Board informed Congressional appropriations committees that the continued functioning of the Board depended entirely upon the entry of a registration order adverse to petitioner.<sup>16</sup> The Attorney General instituted no proceed-

<sup>15</sup> After the registration order was issued, the Communist Control Act gave the Board the additional function of identifying Communist-infiltrated organizations. The definition of the latter also presupposes the existence of a Communist-action organization (Sec. 3(4A)).

<sup>16</sup> Hearings before Subcommittee of Comm. on Appropriations: On 2d Suppl. Appropriations Bill for 1951, H. R., 81st Cong., 2d Sess., p. 263; On Independent Offices Appropriations for 1953, H. R., 82d Cong., 2d Sess., pp. 245, 248; On Independent Offices Appropriations for 1954, H. R., 83d Cong., 1st Sess., pp. 188, 190, 196-198.

ing under the Act against any other organization during the two years that the case against petitioner was pending before the Board. But two days after the Board issued its decision against petitioner, the Attorney General filed twelve petitions with the Board, all charging that the organizations named were Communist-front organizations and that the Communist-action organization which controls them is the petitioner herein. In the four and a half years since the Act was passed, only one organization, the petitioner, has been charged before the Board with being a Communist-action organization.

The pressure on the Board to preserve itself and the Act by deciding against petitioner was intensified by considerations of personal interest. The members of the Board had to rule against petitioner if they were to have any further business and thus keep their jobs, salaries, and the appointment patronage available to them as heads of an agency. The Board's staff, including those employees who assisted the Board in analyzing the record and preparing the decision, had a similar job interest in seeing that the order was adverse to petitioner.

### **B. The Proceeding Before the Board**

The Act became law on September 23, 1950, and the Attorney General filed his petition with the Board on November 22, 1950 (R. 1).

The taking of evidence commenced on April 23, 1951, before a panel of three Board members (R. 1).<sup>17</sup> Following issuance by the panel of a recommended decision adverse to petitioner, the Board on April 20, 1953, issued its order requiring petitioner to register as a Communist.

<sup>17</sup> The panel was reduced to two in October, 1951, when the chairman, Charles M. LaFollette, was forced to withdraw because of adjournment of the first session of the 82nd Congress without confirmation of his appointment.

action organization (R. 138). The order was accompanied by a Report, in which the Board set forth its findings and opinion in support of the order, as required by Section 13(g) of the Act (R. 1-137).

The Attorney General called twenty-two witnesses. Two of these translated or identified a few documents (R. 135-36). A third, a Columbia University professor, testified that petitioner and the Soviet Union held similar views on a number of international questions (R. 136).

The remaining nineteen witnesses had once held membership in the Communist Party. Fourteen had left or been expelled from the Party prior to the date of the Act, eight of them for periods ranging from five to twenty years before the Act (R. 134-35). None of the fourteen gave testimony as to the character or activities of the petitioner subsequent to the termination of his membership.

The testimony of the five witnesses who had remained in the Party after the date of the Act (R. 134-35) was meagre, and related almost exclusively to the period before that date. These witnesses had been rank and file members or minor officers of local units of the Party. Two of them had become virtually inactive in the Party prior to the date of the Act (R. 1034-35; Tr. 12360). Except for Haryey Matusow, all five produced little evidence on which the Board relied.

The great bulk of the documentary evidence introduced by the Attorney General consisted of Communist writings which likewise long antedated the Act. These included the *Communist Manifesto* of 1848, writings in the 1920's or earlier of Lenin and Stalin, and resolutions and reports of the Communist International (dissolved in 1943), of which the most recent is dated 1935. The Report contains copious quotations from and citations to these early works, but ignores contemporary writings of American Communist leaders put in evidence by petitioner as authoritative expositions of its policies, including writings whose au-

thoritativeness was acknowledged by the Attorney General's own witness (e.g., C. P. Exs. 55, 58; R. 979-80, 983-84).

The Attorney General paraded as witnesses some of the most notorious professional informers on the current scene.<sup>18</sup> The testimony of several of these witnesses had been rejected as false in previous proceedings.<sup>19</sup> One of the Attorney General's witnesses had earlier admitted perjurying himself in prior appearances as an anti-Communist witness and declared his readiness to continue doing so.<sup>20</sup> Unimpeached documentary evidence established that many of these witnesses perjured themselves in the proceeding before the Board.<sup>21</sup> Subsequent to the hearing, one of the Attorney General's witnesses has admitted a series of perjuries.<sup>22</sup> Two others have been shown to be so unreliable that even the Department of Justice has stopped using them as witnesses.<sup>23</sup> Still others have thoroughly discredited themselves.<sup>24</sup>

<sup>18</sup> E.g., Budenz, Matusow, Crouch, Manning Johnson, Gitlow, Markward (R. 134-35).

<sup>19</sup> Honig, Johnson, Crouch. Honig's testimony was rejected by Judge Sears, the presiding officer in the first Bridges deportation case (Tr. 6439-40). In the recent prosecution of Bridges for perjury, the Ninth Circuit rejected the testimony of Johnson and Crouch that Bridges attended a Communist Party convention, on the grounds that unimpeachable documentary evidence established that the alleged attendance was impossible. See *Bridges v. United States*, 199 F. 2d 811, 841.

<sup>20</sup> Manning Johnson (R. 669-74).

<sup>21</sup> Gitlow (R. 273-78; C. P. Ex. 1); Crouch (Tr. 5967-71; C. P. Ex. 20); Budenz (R. 1178-80, 1187-91); Markward (R. 734-35, 200-01); Scarletto (R. 1091-92); Evans (Tr. 11579, 11687, 11691, 12486-88; C. P. Ex. 79); Kornfeder (Tr. 1607-27; R. 350-51); Honig (Tr. 4514-22, 4573-87, 4608-20).

<sup>22</sup> Harvey Matusow. See Matusow, *False Witness* (1955), pessim. and R. 2064-65).

<sup>23</sup> Crouch and Johnson (R. 2060-64).

<sup>24</sup> E.g., Gitlow has recently testified that among "the ministers who carried out the instructions of the Communist Party or collaborated with it" were Rabbi Stephen S. Wise, Rabbi Judah L. Magnes, Rev.

The case of the petitioner was presented through three witnesses. Two of these (Elizabeth Gurley Flynn and John Gates) have for many years been members of the petitioner's national committee, its highest governing body in the intervals between national conventions.<sup>25</sup> The third witness, Dr. Herbert Aptheker, a member of the Communist Party, and a distinguished historian and author, testified as an expert on Marxism-Leninism (R. 136).

The testimony of these witnesses and the documentary evidence introduced through them, present a detailed portrayal of petitioner's purposes, views, policies and activities as they exist currently and from the time of petitioner's reconstitution as a political party in 1945 (R. 1199-1241, 1257-97).

The Report either rejects or ignores all of the oral and documentary evidence presented by petitioner, although much of it was uncontradicted. It goes to fanciful lengths to disparage the credibility of Gates and Aptheker (R. 17-18, 38-39). It makes no adverse comment on any of the Attorney General's witnesses.

John Haynes Holmes, and other eminent clergymen (Hearing before Comm. on Un-American Activities, H. R., 83rd Cong., 1st Sess., July 7, 1953, p. 2077). Markward's identification of Annie Lee Moss as a member of the Communist Party has been rejected by the Department of Defense (N. Y. Times, Feb. 24, 1954, p. 1; Jan. 20, 1955, p. 1). Secretary of State Dulles rejected Budenz' positive identification of John Carter Vincent as a member of the Communist Party (Hearings before Internal Security Subc. of Comm. on Judiciary, Sen., 82d Cong., 1st Sess., pt. 2, p. 625; N. Y. Times, March 5, 1953, p. 8).

<sup>25</sup> At the time of testifying, Gates was serving a sentence imposed in the first New York Smith Act trial. See *Dennis v. United States*, 341 U. S. 494. Miss Flynn was convicted, after her testimony before the Board, in the second New York Smith Act trial. See *United States v. Flynn*, 216 F. 2d 354.

### C. The Evidence and the Findings

The Board's findings are subsumed in its Report under nine sections. In the first, the Board found "that there exists a world Communist movement, substantially as described in Section 2 of the Act" (R. 9). In the other eight sections, the Board made findings adverse to petitioner under each of the eight standards of Section 13(e). The Board based its ultimate conclusion on the totality of these findings. It did not suggest what its conclusion would have been had it made a finding favorable to the petitioner under any of the standards of Section 13(e).

The court below held that the Board's findings under the "reporting" and "secret practices" standards (13(e)(5) and (7)) were not supported by a preponderance of the evidence. Accordingly, it "struck" these two findings (Op. 72-74). Nevertheless, the court affirmed the Board's order instead of remanding the case for decision anew on the basis of the surviving findings.

The issue before the Board was the current character of the petitioner, i.e., whether it was a Communist-action organization, as defined by the Act, at the time of the proceeding.<sup>26</sup> The Report, though acknowledging this fact (R. 130), ranges over the entire thirty-three years of petitioner's history, indiscriminately commingling discussion of alleged contemporary practices and alleged episodes of the remote past. The great bulk of the evidence on which the Report relies relates to the period when the petitioner was affiliated with the Communist International. The undisputed facts are that petitioner severed its affiliation with the Communist International in 1940, in order to avoid the registration requirements of the then newly en-

<sup>26</sup> Sections 13(g) and (h) of the Act require the Board to determine whether an accused organization "is" or "is not" a Communist-action organization. Likewise, the definition of a Communist-action organization (sec. 3(3)) and the evidentiary criteria (sec. 13(e)) are all phrased in the present tense.

acted Voorhis Act, and that the Communist International itself dissolved in 1943 (R. 14-15).<sup>27</sup> It is also undisputed, and was acknowledged by the court below (Op. 65), that petitioner has had no foreign affiliation since 1940.<sup>28</sup>

The Board acknowledged that there was no post-Act evidence under two of the standards of Section 13(e). As to "instruction and training" (13(e)(4)), the Report admits that "there is no substantial evidence of record showing training of [petitioner's] members in the Soviet Union subsequent to the outbreak of World War II" (R. 92). In fact, none of the instances of alleged training abroad cited in the Report post-date 1936 (R. 90). As to "financial aid" (Sec. 13(e)(3)), the Report finds that after petitioner's disaffiliation from the Communist International in 1940, "evidence of such financial aid does not appear in the record with one exception." The "exception" consisted of the Board's misrepresentation of testimony by Harvey Matusow (R. 88).<sup>29</sup>

<sup>27</sup> The report states that the 1940 disaffiliation did not alter the relationship between the petitioner and the Communist International (R. 6). This conclusion is without foundation and was not accepted by the Court below (Op. 64-65). The evidence is undisputed that the petitioner had no communications or dealings with the Communist International after the disaffiliation (R. 1286). Nor is there any suggestion that the Communist International survived its dissolution in 1943.

<sup>28</sup> The uncontradicted evidence is that petitioner is not, and never was, affiliated with the Communist Information Bureau, and has had no dealings or relations with it (R. 1209-10, 1280-82, 1288; Tr. 15037-38). As the evidence cited by the Report shows, the Bureau is an organization of the Communist Parties of eight European countries for "mutual consultation and voluntary coordination of action" among the member parties (R. 7).

<sup>29</sup> Matusow testified that in 1949 the head of International Publishers told him that the company had, at some undisclosed time in the past, received from the Soviet Union without charge book plates, English translations of books, and page proofs (R. 1036-37). There was no testimony that the petitioner ever benefited from this alleged transaction, and, in fact, the Report itself elsewhere refers to International Publishers as a Soviet organization (R. 87). Matusow has admitted that this testimony was perjurious. *False Witness* (1955).

Though acknowledging that there was no post-Act evidence of either instruction and training or financial aid, the Board nevertheless made findings adverse to petitioner on both subjects (R. 88-89, 93). It then used these findings to support its ultimate determination as to petitioner's current character, and its action was affirmed by the court below (Op. 71-72).

The only post-Act matters cited by the Board to support its findings on the four other standards of Section 13(e) which were sustained by the court below ("directives and policies," "non-deviation," "discipline" and "allegiance") are: (1) obviously irrelevant episodes (e.g., that the *Daily Worker* stations a correspondent in, and prints dispatches from, Moscow (R. 62-63); (2) that petitioner is an avowed adherent of the principles of Marxism-Leninism; and (3) that petitioner publicly opposes the cold-war policy of the national administration and has taken the same position as the Soviet Union on certain international questions (R. 9-86, 98-104, 118-28).<sup>30</sup>

pp. 101-02. It is illuminating to note that the finding as to the next-preceding alleged transaction was based on testimony of Budenz that in 1940 the *Daily Worker* and *Intercontinent News* received news dispatches from a Soviet news agency without cost (R. 88). Documentary evidence demonstrated that Budenz' testimony was false (C. P. Exs. 70-75; R. 1191-94). There is no credible evidence contradicting the testimony of petitioner's witnesses Flynn and Gates that petitioner did not receive any foreign financial aid during their tenure as national committee members, commencing in 1938 and 1945, respectively (R. 1213-15, 1290-91).

<sup>30</sup> In the court below, the Board virtually conceded that the only post-Act evidence supporting its order is petitioner's adherence to Marxism-Leninism and the similarity of its views to those of the Soviet Union. It stated (Respondent's brief, 118): "Petitioner admits that the 'post-Act evidence' shows it to be an American adherent of Marxism-Leninism and that it consistently takes the same position as the Soviet Union. It does not deny the evidence of its non-deviation from Soviet policies and its present secret practices. When these admitted current facts are judged, as they must be, in the light of the evidence of record as to what Marxism-Leninism and non-deviation involve, it is clear that they support the finding that petitioner not only was, but presently is, a Communist-action organization as defined by the Act."

The Board's finding on "reporting" (Sec. 13(e)(5)), stricken by the court below, was in the present tense, though the Report cites nothing after the date of the Act which it characterizes as reporting even under a palpably absurd conception of that term (R. 93-98). There was post-Act evidence relating to "secret practices" (Sec. 13(e)(7)), but, ~~as the court below held in striking the Board's finding, there~~ was no evidence that these practices were engaged in for purposes made relevant by the Act (Op. 73-74). On the contrary, the uncontradicted evidence of both sides was that petitioner's utilization of such practices was a precaution against persecution (R. 1216-23, 919, 1025-26).

The court below affirmed the ultimate finding of the Board primarily on the basis of six factors which it considered determinative (Op. 61-70). The only post-Act evidence supporting these factors are items indicating that petitioner adheres to the ultimate objective of Communism, referred to by the court as "a classless, stateless world," and that petitioner advocates various international policies which are similar to those of the Soviet Union (see *infra*, p. 33).

Accordingly, the real evidentiary basis for the Board's order is petitioner's adherence to the principles of Communism and its views on international questions. This fact also appears from the major features of the Board's treatment of the four standards for which the Report claims the existence of post-Act evidence and which the court below allowed to stand.

*Directives and policies.* The Board found, under Section 13(e)(1), that petitioner formulates and carries out its policies pursuant to directives from and to effectuate the policies of the Soviet Union (R. 79). In reaching this conclusion, the Board first found that prior to petitioner's disaffiliation from the Communist International in 1940, decisions and resolutions of that body were "directives" to petitioner (R. 10-11). The Board cites no evidence that

subsequent to 1940 petitioner received foreign directives in any legitimate meaning of the term. Moreover, petitioner's witnesses, Gates and Flynn, testified, without contradiction, that during their tenure as members of petitioner's national committee, petitioner has received no foreign directives of any kind, but has formulated and carried out its policies pursuant to its independent judgment as to the needs and interests of the American people (R. 1211, 1227, 1288-89).

The Board, however, concluded from its reading of various Communist writings, commencing with the *Communist Manifesto* of 1848, that this body of doctrine constitutes on its face a series of "directives" issued by the Soviet Union and binding upon petitioner <sup>31</sup> (R. 78). The Board found from its reading of the texts that "the [Marxist] classics are one of the chief means by which the C. P. S. U. directs and controls the C. P. U. S. A." (R. 43). The court below applied the same theory, sustaining the Board's order primarily on the grounds that "Marxism-Leninism is basic to the Party" and that petitioner "presents no evidence of a repudiation of world Communist doctrines" (Op. 70). <sup>32</sup>

*Non-Deviation.* The Board found under Section 13(e) (2) that petitioner's "views and policies do not deviate from those of the Soviet Union" (R. 86).

<sup>31</sup> Of course, much of the literature from which the Board draws this conclusion was written long before there was a Soviet Union. Furthermore, the doctrine had American adherents more than half a century before the Russian revolution or the formation of a Communist Party in America (R. 1262-5, 1270-1).

<sup>32</sup> The court stated (Op. 66) that "while the tenets of Marxism-Leninism \* \* \* permit a wide flexibility in tactics, that is, of intermediate activities, they admit of no deviation from the ultimate objective, which is a classless, stateless world." The Report characterizes Marxism-Leninism as an "amorphous amalgam" (R. 42). It states that Marxist-Leninist principles have "been provided an elasticity which makes them applicable under an endless variety of circumstances," and that the "overall policy of Marxism-Leninism" is to do "what is expedient under the given circumstances" (R. 31, 21). Thus, the "directives" of Marxism-Leninism come down to an instruction to achieve "a classless, stateless world."

The Board's finding was based primarily on testimony that the petitioner and the Soviet Union, as shown by their public statements, held similar or "parallel" views on each of 44 different questions relating to international affairs, ranging from the League of Nations in 1919 to the Korean war in 1950 (R. 80, 82-84).

In making its finding on "non-deviation," the Board applied the following principles:

1. That it was irrelevant whether or not the Soviet Union adopted its view on a given subject before petitioner adopted its view. The Attorney General stated that "we have not made any attempt to show how the Communist Party reached the views that it did" (R. 836). He offered no evidence that the Soviet view was adopted or communicated prior to petitioner's expression of its view on the same subject. In affirming the Board's finding, the court below held that the date sequence of the views was irrelevant, stating, "The statutory phrase ['do not deviate from'] refers to identity or coincidence and not to chronological adoption" (Op. 89).

2. That it was irrelevant whether the views were true, reasonable or generally accepted by non-Communists, including, in some instances, the government of the United States. The Board accepted the Attorney General's position (Tr. 8878) that "it does not matter whether the Soviet view on these issues which were raised were [sic] right or wrong, or whether the Soviet view was held by many people, by some people, or by all the people." Accordingly, it sustained the action of the hearing panel in excluding evidence offered by petitioner to show the truth, reasonableness and general acceptance of the views (R. 81).<sup>33</sup>

<sup>33</sup> These rulings were applied to the following views, among others: that there should be negotiations for a cease-fire in Korea (R. 864); that the Chiang Kai-shek regime was a corrupt dictatorship (R. 836-37); that the establishment of a second front in World War II was desirable (R. 844-45); that the League of Nations as originally organ-

3. That it was irrelevant that petitioner arrived at its views independently, and that the similarity of the views of petitioner and the Soviet Union resulted from an independent application by each of the premises and analytical approach of Marxist-Leninist principles. Evidence to this effect was excluded by the hearing panel. The Board affirmed the panel's rulings. Yet its Report asserts that the "great weight of the evidence is contrary" to the proposition which petitioner was precluded from proving <sup>34</sup> (R. 842-44, 80, 86).

4. That it was irrelevant that the views were calculated to promote the peace and well-being of the United States, or even that the United States government officially adopted them (R. 81).<sup>35</sup> The Attorney General made no attempt to show that any of the views testified to were dangerous, seditious, or opposed to the national interests of the United States. He took the position that these matters were "wholly irrelevant" (Tr. 9059). In agreement with that position, the hearing panel excluded evidence offered by petitioner to show that the views in question were in the national interest, and the Board affirmed its ruling (R. 839, 844, 861, 864, 81).

Petitioner's witnesses testified, without contradiction, that petitioner's views and policies are established by it

ized, promoted imperialist purposes (R. 839; Tr. 9063); that the defendants in the 1937 Soviet treason trials were guilty as charged (R. 840); that Oatis' confession of espionage was true (R. 845); that the Syngman Rhee government was a corrupt police state (R. 862-64). Citations are to exclusions on cross-examination. For renewal of the rulings to exclude the proof in petitioner's affirmative case, see R. 1274-75.

<sup>34</sup> This too though the Attorney General's expert witness, on whose testimony the "non-deviation" finding is based, testified that he was unable to conclude that the petitioner's views were not arrived at independently (R. 837-38).

<sup>35</sup> E.g., the views that a second front in World War II was desirable and that a cease-fire in Korea should be negotiated (R. 844-45, 864).

in the exercise of its own best judgment and in the application of the principles of scientific socialism to current conditions. They further testified that the similarity of petitioner's views on international questions to those of the Communist Parties of other countries, including the Soviet Union, is only natural because all Communists share the same scientific approach and are guided by the needs of the working people, who in all lands have a common interest in promoting international friendship, cooperation and world peace (R. 1224-27, 1283-84). Also uncontradicted was petitioner's testimony that it has often taken positions in advance of the Soviet Union and has taken positions on many questions as to which the Soviet Union has never expressed a view (R. 1227).

*Discipline.* The Board found that petitioner recognizes and is subject to the disciplinary power of the Soviet Union (R. 104; Op. 72-73).

To support this finding, the Report cites four instances in which members of petitioner were allegedly expelled or otherwise disciplined on the initiative of the Communist International during the period of petitioner's affiliation with that organization (R. 102). The most recent of these cases occurred in 1934. The Report and the court below cite four other disciplinary cases (R. 102-03; Op. 73). These were: petitioner's expulsion of Johnson in 1940 for opportunism; its expulsion of Lautner in 1950 on the charge that he was a police spy; its expulsion of Tomkins in 1951 for distributing anti-Soviet leaflets; its demotion of Browder in 1945 for abandoning Marxist-Leninist principles, and its expulsion of him in 1946 for conducting a factional fight against the decisions of petitioner's national convention. Neither the Board nor the court below suggested that the Soviet Union had anything to do with these cases of internal discipline, and no such suggestion could find support in the record.

Both the Board and the court relied heavily on petitioner's practice of "democratic centralism" to support the finding

on foreign discipline (R. 103-04, 56-57; Op. 72). The Board found that "democratic centralism" is a Marxist-Leninist principle of organization which requires the election of all officers and leading committees; full discussion of all policy questions before a decision is taken by the appropriate body; unqualified acceptance by the minority of majority decisions, and the execution of such decisions by the entire membership (R. 56). The Board found that prior to 1940 adherence to the principle of democratic centralism obliged petitioner to accept decisions of the Communist International to which it was affiliated (R. 57). However, subsequent to petitioner's 1940 disaffiliation from the Communist International, which dissolved in 1943, there has been no international organization whose decisions are binding on petitioner, and the Board makes no finding to the contrary. Hence, at least since 1940, petitioner's practice of democratic centralism relates solely to internal management. As the Attorney General's own witness, Lautner, testified, democratic centralism "pertains to rules and regulations by which the Communist Party governs itself" (R. 965).

The petitioner's witnesses testified, without contradiction, that petitioner's leaders and members are not subject to and do not recognize the disciplinary power of any foreign government or organization (R. 1223-24).

*Allegiance.* The Board found under Section 13(e)(8) that petitioner's "leaders and its members consider the allegiance they owe to the United States as subordinate to their loyalty and obligations to the Soviet Union" (R. 128). This finding is based primarily on the Board's view (R. 118-23) of Communist theory as developed in the works which were examined by this Court in *Schneiderman v. United States*, 320 U. S. 118, and from which this Court concluded that belief in Communist doctrine was not incompatible with attachment to the principles of the Constitution and being well disposed to the good order and happiness of the United States.

Petitioner's witnesses testified that petitioner's leaders and members owe allegiance only to the United States and its people, and that they do not consider their allegiance to this country subordinate to any obligations (of which they have none) to any foreign government or foreign organization. They repudiated the Board's version of Marxism-Leninism. Their testimony was documented by evidence of writings distributed by petitioner opposing doctrines of forcible overthrow of the government and affirming the allegiance of Communists to the United States (R. 1235-41, 1282-83; C. P. Ex. 55, p. 3; C. P. Ex. 56, p. 3).

*Facts Relied on by the Court.* The court below sustained the ultimate finding of the Board primarily on the basis of six factors which it characterized as "underlying basic facts" that "are heavy in the scales" and "determine the final answer" (Op. 61). These factors were:

(1) The fact that petitioner "presents no evidence of a repudiation of world Communist doctrines" subsequent to its disaffiliation from the Communist International in 1940 (Op. 70).

(2) The fact that petitioner calls itself the Communist Party of the United States. The court explained that "it is difficult for us to see why the Party would call itself the Communist Party of the U. S. A. if it were not in fact a part of the Communist movement in theory and program" (Op. 65).

(3) The fact that the reconstitution of the Communist Party in 1945 resulted from what was considered to be a prior departure from the principles of Marxism-Leninism (Op. 65-66).

(4) The fact that petitioner adheres to the "ultimate objective" of Marxism-Leninism, "a classless, stateless world" (Op. 66).

(5) The fact that "the Party's press follows closely world Communist views" (Op. 70).

(6) The fact that petitioner's views on a series of international questions (see *supra*, p. 29) were similar to the views of the Soviet Union (Op. 68-69).

The court below did not find that any of these factors involve the advocacy of violent or unconstitutional means for the attainment of petitioner's immediate or ultimate objectives. It noted the testimony of petitioner's principal witness that petitioner advocates a peaceful and constitutional transition to socialism in this country (Op. 67). It acknowledged that it is "the established position of Communist leaders that American democracy has gone far in protecting the rights of minorities and of working people and in advancing the economic status of such people, and that in that respect American democracy receives the plaudits of those leaders" (*ibid.*). The court, however, considered this position irrelevant, on the ground that it "in no way negates the ultimate stateless world objective of the world Communist movement" (*ibid.*).

*World Communist Movement.* As we have seen (*supra*, p. 15), the court below held that the findings of Section 2 of the Act with reference to the existence and nature of a world Communist movement were conclusive upon the Board and the courts. Nevertheless it reviewed and sustained the finding of the Board that on the evidence, "there exists a world Communist movement substantially as described in section 2 of the Act" (R. 9; Op. 61).

The court's conclusion was based (Op. 56-60) on its reading of the *Communist Manifesto*; Stalin's *Problems of Leninism* and *Foundations of Leninism*; <sup>36</sup> the *Theses and Statutes* adopted by the Communist International in 1920;

<sup>36</sup> The American editions of these works of Stalin which were introduced, were published in 1934 and 1932, respectively. They were written in 1926 and 1924, respectively. A. G. Exs. 138, 121A.

and the *Programme of the Communist International*, adopted at the Sixth Congress of that organization in 1928 and superseded by the resolutions of the Seventh Congress in 1935. (A. G. Exs. 125 and 137). From these works the court below found that there is a world Communist movement having the following characteristics: (1) The movement has as its ultimate objective "a classless, stateless society ruled by the proletariat of the world."<sup>37</sup> (2) "The basic concepts of this ultimate objective are that the sole value is labor and that capitalism and nationalism are merely means for exploiting the masses of workers." (3) the program of the movement "calls for a small hard core of revolutionaries, formed into a disciplined Party in every country," which is to attain control of the government in order to destroy its present form and ultimately weld it into the stateless world society. (5) In the interim period, the Soviet Union, being the first and so far biggest government under Communist control, "must be protected, and preserved as Communistic at any cost" (Op. 60-61).

Accordingly, the court below found that there is a world Communist movement in the sense that there are Communist parties in various countries which base their program and activities on a common economic and political outlook, and work toward the ultimate achievement of a common goal—a universal, classless, stateless society.

The movement found by the court below is palpably not the world Communist movement postulated in Sections 2, 3(3) and 13(e) of the Act. The movement postulated by the Act is characterized by the presence of a highly centralized organization, rigid control by a foreign government, and the use of violent and criminal means. Thus subsections (1), (5) and (8) of Section 2 describe the movement as operating "through the medium of a world-wide Communist organization" of which the Communist parties of the various coun-

<sup>37</sup> The court does not explain how there can be a proletariat, which by definition is a class, in a classless society, or how it can rule in a stateless society.

tries are "sections" and "affiliated constituent elements." Subsections (4) and (5) of Section 2 find that the control of the world Communist movement is vested in "the Communist dictatorship of a foreign country" through the medium of "action organizations" which are "sections of a world-wide Communist organization." And subsections (1) and (11) of Section 2 find that the world Communist movement employs espionage, sabotage, terrorism and treachery.

Neither the court below nor the Board found, or could have found from the evidence, the existence of a movement having these characteristics. The only organization which was "a world-wide Communist organization" was the Communist International. But, as the court concedes, the Communist International was dissolved in 1943 and has not been succeeded by any similar organization.<sup>38</sup>

In the absence of such an organization, there could be no foreign control of the movement "through the medium" of the organization. Furthermore, the court below did not find that the movement which it described is controlled by the Soviet Union. Finally, the record is devoid of evidence of the means employed by the Communist parties of other countries to achieve their objectives. It is equally devoid of evidence that petitioner has committed or advocated acts of terror, sabotage or espionage, and indeed the court below held that no such evidence is required by the Act (*supra*, p. 17).

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<sup>38</sup> The Communist Information Bureau, referred to by the court below (Op. 60), is not, and was not found to be, the organization described in section 2. Its membership is not world-wide, but is confined to the Communist parties of eight European countries (R. 17; 1592). It is not a centralized organization, but, as the Board's report states and a witness for the Attorney General testified, its purpose is to provide a medium for "mutual consultation and voluntary coordination of action" among the member parties (R. 7; 937-38; 971). Moreover, the court below acknowledges (Op. 65) that petitioner is not affiliated with the Communist Information Bureau, and the uncontradicted evidence shows that petitioner has never had dealings with it (R. 1205-10; 1286-89).

The petitioner's witnesses testified that there is no "world Communist movement" as described in Section 2. According to their testimony, a world Communist movement exists today only in the sense that there are Communist Parties in most nations, all of which are independent of one another, but which share a common working-class science and world outlook, and work for the eventual establishment of socialism in their respective countries by the free choice of a majority of the people of each country (Tr. 15137-40, 15229-30, 15950, 15137-39).

Petitioner denied that it was a Communist-action organization. It described itself as "a political party of the American working class, basing itself on the principles of scientific socialism-Marxism Leninism" (A. G. Ex. 374; R. 1695). While its ultimate objective, as stated in its constitution, is "the establishment of socialism by the free choice of a majority of the American people" (A. G. Ex. 374), it is petitioner's view that the issue now before the American people is not between socialism and capitalism, but between peace and war, democracy and fascism (R. 1229; A. G. Ex. 378, p. 1; C. P. Ex. 55, pp. 8, 10, 30-31). According to petitioner's witnesses, its immediate objectives are to promote the interests of American labor and the people under capitalism by organizing and uniting them for action to win demands which are realizable under capitalism. These include maintaining peace, preserving and extending civil liberties, improving the economic conditions of the workers and eliminating racial and religious discrimination. (R. 1201-02).

### D. Extra-Legal Pressures on the Board and Manifestations of Bias

1. The President named the five original members of the Board by so-called recess appointments on October 23, 1950. He submitted their nominations to the Senate on November 27, 1950 and again on February 12, 1951 (*First Annual Report, Subversive Activities Control Board*, p. 5). However, the Senate Judiciary Committee under the chairmanship of Senator McCarran, one of the fathers of the Act, took no action on these nominations until July 30, 1951. It then reported favorably on three of the appointees, but took no action on Charles M. LaFollette, chairman of the hearing panel and acting chairman of the Board.<sup>39</sup> The three nominees reported on favorably were confirmed by the Senate ten days later (*Second Annual Report, Subversive Activities Control Board*, p. 5). The LaFollette nomination died in committee with the adjournment of the Eighty-Second Congress on October 20, 1951, at which time Mr. LaFollette ceased to serve (J. A. 1).

Accordingly, for many months during the pendency of this proceeding,<sup>40</sup> the jobs of the Board members were subject to the pleasure of the Senate Judiciary Committee, which had stated, in its report on the bill which became the Act, that "there is incontrovertible evidence of the fact that the Communist Party of the United States" is a Communist-action organization.<sup>41</sup>

During the hearing, it developed that witnesses of the Attorney General were reporting on the conduct of the pro-

<sup>39</sup> The fifth original member of the Board and its first chairman, Mr. Seth W. Richardson, resigned on June 6, 1951, because of his health (*First Annual Report, Subversive Activities Control Board*, p. 5).

<sup>40</sup> The petition was filed on November 22, 1950, and after pre-hearing motions were disposed of, the panel began to hear testimony on April 23, 1951 (J. A. 1).

<sup>41</sup> *Supra*, p. 16.

ceeding by the panel to a staff member of Senator McCar-ran's committee. The panel chairman reacted to this surveillance as follows:

"Mr. LaFollette: So that my own thinking may be clear for everybody to know, I feel pretty much the same way about this witness discussing my conduct in the hearing room with Mr. Mandel, under the circumstances, as I would if I were a nisi prius judge in an elective office, and a political boss had the right to control my nomination or renomination" (R. 297).

2. During the course of the hearing, Board and panel member McHale made a speech before the Women's National Democratic Club in which she discussed the proceeding at some length. She referred to one of the issues of fact which had arisen in connection with the "non-deviation" criterion and to the character of the world Communist movement; and expressed a prejudgment on both (R. 193-6, 187-190). She clearly indicated her view that the hearing was merely a formality by likening the petitioner to the rabbit in the aphorism, "As an old recipe for rabbit stew goes, we must first catch the rabbit" (R. 196).

Immediately after the issuance of the panel's recommended decision and while the proceeding was pending on review before the full Board, chairman and panel member Brown, together with the Board's general counsel, appeared on a radio and television forum sponsored by Georgetown University and devoted to a discussion of this case from an anti-Communist point of view. The chairman and the general counsel commented on the evidence, expressed self-gratulatory delight with the recommended decision, and stated their conviction that petitioner is a Communist-action organization as defined in the Act. In referring to the Act's definition of Communist-front organizations, the chairman stated that they are organizations controlled by the Communist Party, thereby demonstrating his awareness of and agreement with the Act's prejudgment (R. 197-98, 206-08).

The conduct of Brown and McHale was made the subject of affidavits of bias and prejudice, filed under Section 7(a) of the Administrative Procedure Act, 5 U. S. C. 1006(a), made applicable to the proceeding by Section 6 of the Act (R. 187-90, 196-99). The Board refused to disqualify them (R. 190, 209).

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### **E. Petitioner's Motion to Adduce Additional Evidence**

While this proceeding was pending before the lower court, petitioner moved pursuant to Section 14 of the Act for leave to adduce additional evidence before the Board.<sup>42</sup> The motion and supporting affidavit in substance stated and offered to prove that subsequent to the conclusion of the proceeding before the Board, two of the Attorney General's principal witnesses, Crouch and Johnson, committed perjury in other proceedings<sup>43</sup> and that a third, Matusow, admitted a course of perjury<sup>44</sup> (R. 2053-68). The moving papers further stated that because of the public disclosure of the perjury of these three informers, the Attorney General had ceased to employ them as witnesses<sup>45</sup> (R. 2063-65).

Petitioner's motion and affidavit further showed from an analysis of the Report that in numerous instances the Board had rested material findings of fact adverse to petitioner

<sup>42</sup> Section 14 provides for the granting of such a motion upon a showing "to the satisfaction of the court that such additional evidence is material."

<sup>43</sup> Johnson before the International Organizations Loyalty Board in a proceeding with respect to Dr. Ralph J. Bunche; Crouch, in *U. S. v. Kuzma*, a Smith Act conspiracy prosecution in the Eastern District of Pennsylvania and in *Matter of Jacob Burck*, a deportation proceeding (R. 2061-64).

<sup>44</sup> These admissions were made to Bishop G. Bromley Oxnam and to Messrs. Russell Brown and Robert Norvell, law associates of former Attorney General J. Howard McGrath (R. 2064-65).

<sup>45</sup> As petitioner's affidavit also shows, the cross-examination of these three informers in their appearances before the Board had developed a pattern of false testimony both in this proceeding and, in the case of Crouch and Johnson, in prior proceedings (R. 2059-60).

in whole or in part on the testimony of these three witnesses (R. 2056-57, 2067-68).<sup>46</sup>

Respondent filed no counter-affidavit, but urged that petitioner's motion should be denied for lack of a showing that a hearing of the additional evidence would probably change the result—i.e. persuade the Board to find for petitioner (R. 2069-79). The court below denied petitioner's motion without opinion, Judge Bazelon not participating (R. 2082).

Subsequent to the court's action and its decision in this case, Matusow, by affidavits and from the witness stand, has recanted as perjurious his testimony in two other proceedings (*U. S. v. Jencks*, U. S. D. C. W. D. Tex.; *U. S. v. Flynn et al.*, D. C. S. D. N. Y.).<sup>47</sup> In addition, Matusow has written and published a book, *False Witness*, in which he details numerous instances in which he gave false testimony under oath, including (pp. 101-02) his testimony before the Board in this proceeding. Finally, the Board recently ruled that it would disregard all of the testimony of Matusow in another proceeding before it because of the admissions made by him to Bishop Oxnam and Brown. Report of the Board, *Brownell v. Labor Youth League*, No. 102-53, pp. 4-5.

<sup>46</sup> The Board's annotated version of the Report (R. 1799-2052) reveals that the Board supported its findings of fact with 36 separate references to the testimony of Crouch, 25 to the testimony of Johnson and 24 to the testimony of Matusow (R. 2067-68). To cite but four examples: Matusow's is the only testimony relied on by the Board to support its findings that petitioner advocated the violent overthrow of the government in the post-Act period and that it received foreign financial aid subsequent to 1940 (R. 2020, 1962). The Board's key finding that petitioner's 1940 disaffiliation from the Communist International was spurious is based on the testimony of Crouch (R. 1826, 1811, 2036). And the Board relied heavily on the testimony of Johnson for its findings with reference to the authority over petitioner exercised by alleged representatives of the Communist International (R. 1909, 1972, 2028, 2030).

<sup>47</sup> After a hearing in the *Jencks* case, the District Court denied a motion for a new trial based upon Matusow's perjurious testimony. The court in the *Flynn* case has taken a similar motion under advisement upon the conclusion of a hearing.

## REASONS FOR ALLOWING THE WRIT

**I. The Board's order, if allowed to stand, will have immediate and far-reaching consequences of the greatest public importance.**

A. If the Board's order becomes final, it will immediately outlaw the Communist Party, proscribe all of its advocacy, prevent it from engaging in lawful political activity, and subject its members to intolerable sanctions. It will lay the foundation for mass prosecutions of members for failure to comply with the impossible requirement that they publicly declare that they are criminal conspirators and expose themselves to the Act's sanctions. For all practical purposes, a final order will make membership in the Communist Party a crime.

This is the first time in our history that the Communist Party or any other political party has been outlawed by federal legislation. Yet Marxist groups and parties have been active in this country as lawful political organizations since the middle of the last century,<sup>48</sup> and the Communist Party has been a legal political party since its inception. Although always numerically small, it has run numerous candidates for public office, some of whom were elected, has participated in coalitions to elect non-Communist candidates, and has engaged in other political and economic activity within the tradition of American working class and socialist parties which preceded it.

<sup>48</sup> American Marxists helped in the formation of the Republican Party, backed Lincoln's candidacy in 1860, made significant contributions to the cause of the federal government in the Civil War, helped form the first national federation of American trade unions, and played a leading role in organizing the American Federation of Labor. See R. 1262-65, 1270-71; Gompers, *Seventy Years of Life and Labor* (N. Y. 1925), v. 1, pp. 51-60. Marx once observed, "Socialism and Communism did not originate in Germany, but in England, France and North America." *Selected Works* (N. Y. 1926), p. 140.

Even the worst enemies of the Communist Party must admit that it has frequently played a seminal role in bringing about needed changes in our social and economic life. Many of the reforms advanced by the Communist Party, and originally the object of vilification, have been adopted by the people of the United States, when they were convinced, with the aid of Communist agitation, that these were to their best interest. To name only a few: social security, minimum wage legislation, the organization of labor unions on industrial lines, and measures against racial discrimination.

No other Western democracy outlaws the Communist Party.<sup>49</sup> Only the United States, the most powerful capitalist nation, which proclaims leadership of the free world; asserts that such a measure is necessary for its safety and compatible with a democratic society. Yet Mr. Justice Douglas has observed that "America's 'growing tendency in the interests of security to take short cuts, to disregard the rights of the individual, to sponsor the cause of intolerance, and to adopt more and more the tactics of the world forces we oppose . . . have helped lose for America the commanding position of moral leadership which we had at the end of World War II.'" <sup>50</sup>

B. A final order of the Board will supply the foundation for governmental proscription of many organizations in addition to the petitioner and for the imposition of the Act's sanctions against their members. The Board has already ordered one organization to register as a "Communist-front," and proceedings are now pending against twelve other organizations on the same charge. These organizations include two schools for social studies and groups pro-

<sup>49</sup> Legislation to outlaw the Communist party of Australia was held unconstitutional by the High Court. *Australian Communist Party v. The Commonwealth*, 83 C. L. R. 1.

<sup>50</sup> Address to the American Law Institute, *New Republic*, Nov. 16, 1953.

moting such causes as civil liberties, the interests of the foreign born, economic security for the aged, etc.<sup>51</sup>

The number of front organizations can, and undoubtedly will, be multiplied almost indefinitely in the light of the comprehensive criteria of section 13(f).<sup>52</sup> And the sweep of the Act has been recently extended by the creation of a new category, "Communist-infiltrated" organizations, under which the Attorney General will, as he has indicated, institute proceedings against a number of trade unions.<sup>53</sup> Moreover, if the present categories of front and infiltrated organizations turn out to be too restricted, new ones can, and undoubtedly will, be created. Having moved from action and front organizations to infiltrated organizations, the Act could next be extended to groups which are "contaminated," "tainted," "tinged," and finally, "politically unreliable."

If the Constitution can be held to authorize the premises which underlie the proscription of petitioner, there remains little room for constitutional objections to the application of the Act to all of these other organizations.

<sup>51</sup> The names of these organizations give some indication of the diverse nature of their activities: Civil Rights Congress, American Committee for the Protection of Foreign Born, Jefferson School of Social Science, Labor Youth League, Council on African Affairs, Washington Pension Union, Council for American-Soviet Friendship, Veterans of the Abraham Lincoln Brigade, Committee for a Democratic Far Eastern Policy, Joint Anti-Fascist Refugee Committee, American Slav Congress, United May Day Committee, California Labor School.

<sup>52</sup> An illustration of these criteria in operation is supplied by the following typical allegation made by the Attorney General in a petition to require an organization to register as a front: "The Committee supported the views, policies and objectives of the Communist Party by opposing the enactment of certain legislation regarded by the Party as inimical to its interests such as the Mundt-Nixon Bill, the Hobbs Bill, and the Internal Security Act of 1950." Paragraph III(4)(c) of Amended Petition in *Brownell v. American Committee for Protection of Foreign Born*, Docket No. 109-53, Subversive Activities Control Board.

<sup>53</sup> N. Y. Herald-Tribune, Sept. 13, 1954, p. 1.

Moreover, the techniques and interpretations of the Act used against petitioner by the Board and the court below, will, if allowed to stand, be applied in cases involving other organizations so as to destroy virtually any group whose views are not governmentally approved.

C. If the order of the Board becomes final, the civil and criminal penalties which the Act imposes on individuals for membership in petitioner will be extended far beyond those who are its members by any conventional or rational standards. The all-embracing criteria of membership contained in section 5 of the Communist Control Act will jeopardize the liberty of countless non-Communists, including all those who are now "security risks."<sup>54</sup> Such persons as Oppenheimer, Vincent, Davies, Ladejinsky, Condon, Lattimore, Peters, and many thousands of lesser prominence, will be natural targets of the civil disabilities imposed by the Act on "members" of petitioner and of prosecution for failure to register. The Court should not wait until the axe has fallen on some of these victims before determining whether it may be constitutionally wielded.

D. If the Act and the order of the Board are allowed to stand, traditional American liberties, already severely restricted, can scarcely survive. As President Truman declared in vetoing the bill which became the Act (H.R. Doc. No. 708, 81st Cong., 2d Sess., pp. 6-7):

"Obviously, if this law were on the statute books, the part of prudence would be to avoid saying anything that might be construed by someone as not deviating

<sup>54</sup> See *supra*, p. 7. Commenting on section 5, the *Newark Ledger* stated: "Such a law might be used to herd into prison thousands of persons who have never been Communists and who have no basic sympathy with the Communist conspiracy." 100 Cong. Rec. 14399. The *Wall Street Journal* said: "One of these provisions is that it would be evidence of cooperation with the Communist groups if any person has indicated a willingness to carry out aims and purposes of the party. For all we know the Communist Party may be against juvenile delinquency. So is this newspaper." *Id.* at 14400.

sufficiently from the current Communist-propaganda line. And since no one could be sure in advance what views were safe to express, the inevitable tendency would be to express no views of controversial subjects."

For this reason, the President declared that the registration provisions of the legislation "represent a clear and present danger to our institutions" (*Id.*, p. 5). On this and related grounds, passage of the Act was opposed by numerous trade unions, religious and community organizations, more than twenty major newspapers, and many prominent lawyers and laymen.<sup>55</sup>

This proceeding immediately involves the rights of Communists. But events of recent years have once more proved that repression cannot be contained. What began as a drive against Communists has inexorably led to the victimization of thousands of non-Communists, who have been prosecuted, dismissed from their jobs, blacklisted, ostracized, barred from public platforms, deported, denied the right to leave or enter the country, and otherwise persecuted. Of even more moment have been the pervasive restraints on expression, the burning of books, and the creation of "the ministry of fear in our country."<sup>56</sup>

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<sup>55</sup> *Hearings before House Committee on Un-American Activities*, H. R., 81st Cong., 2d Sess., on H. R. 3903 and 7595; *Hearings before the Committee on the Judiciary*, Sen., 80th Cong., 2d Sess., on H. R. 5852; Cong. Rec., 81st Cong., 2d Sess., pp. A6135, A6220-21, A6724-26, A7397, A7266, A7275-81. See R. 185. Organizations opposing the bills included: A. F. of L., C. I. O., Brotherhood of Railway Trainmen, National Farmers Union, Society of Friends, American Unitarian Association, National Fraternal Council of Negro Churches, American Civil Liberties Union, Americans for Democratic Action, American Association of University Professors, National Association for Advancement of Colored People, Council for Social Action, Congregational Christian Churches, United Council of Church Women, American Jewish Congress, Women's International League for Peace and Freedom, National Council of Jewish Women, American Veterans Committee, National Community Relations Advisory Council.

<sup>56</sup> Averill Harriman, quoted in N. Y. Post, May 5, 1953.

When the court below sustained the Act and the Board's order, it upheld the premises of McCarthyism on which they are based. These are coerced conformity, suppression of peaceable assembly and advocacy, determination of guilt by legislative fiat, imputation of guilt by association, trial by a biased tribunal, judgment on the basis of irrational and vague standards, and acceptance of the testimony of professional perjurers. If these execrable policies may lawfully be applied to petitioner, they may be, and inevitably will be, extended to the people as a whole. Indeed, the techniques which the Act and the Board employed against the petitioner have only recently been used to indict four Democratic administrations and the present Republican administration for "twenty-two years of treason," to impugn the loyalty of two former presidents, and to impeach the integrity of the foreign service and the armed forces.

The issue which this case presents is not whether Communism will survive in America, but whether the Constitution will survive to protect the whole American people.

**II. This proceeding presents fundamental constitutional questions which have not been but should be settled by this Court or which were decided by the court below in a way in conflict with the applicable decisions of this Court.**

- A. Whether the Act violates due process or is a bill of attainder because it predetermines, by legislative fiat, facts essential to the ultimate determination that petitioner is a "Communist-action" organization.**

Since the order of the Board deprives petitioner and its members of liberty and property, it may not be entered without a hearing. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123; *Morgan v. United States*, 304 U. S. 1. If any of the elements requisite to a finding that

petitioner is a "Communist-action" organization have been determined adversely to petitioner by legislative fiat rather than by a free adjudication of the facts, the due process requirement of a hearing has been violated. *Manley v. Georgia*, 279 U. S. 1; *Western and Atlantic Railroad v. Henderson*, 279 U. S. 639; *McFarland v. American Sugar Refining Co.*, 241 U. S. 79; *Tot v. United States*, 319 U. S. 463. Cf. *Moore v. Dempsey*, 261 U. S. 86; *Frank v. Mangum*, 237 U. S. 309; *Palko v. Connecticut*, 302 U. S. 319.

Under our analysis, the Act finds and removes from administrative adjudication all the facts essential to a determination against petitioner (see *supra*, pp. 14-16). But even if only one of the essential facts had been legislatively predetermined, due process would be violated.

1. One of these essential facts is, obviously, the existence of a world Communist movement having the attributes ascribed to it by section 2 of the Act. For by definition (Sec. 3(3)), a Communist action organization is one which is controlled by and advances the objectives of "the world Communist movement referred to in section 2." Yet the findings in Section 2 on the existence and nature of a world Communist movement are incorporated into Sections 3(3) and 13(e) as assumptions of fact which the Board is not authorized to reexamine, but is required to accept as the foundation for its decision.

This circumstance was acknowledged by the court below. It held that for the purposes of reviewing the sufficiency of the evidence, the court was required to accept the Congressional finding of "a world Communist movement whose purpose it is, by treachery, sabotage, or any other necessary means, to establish a Communist proletarian dictatorship throughout the world" (Op. 56).<sup>57</sup>

<sup>57</sup> The Board took the same position in its brief below. See *supra*, p. 15.

The court nevertheless held that this legislative determination was not a denial of due process, stating (Op. 55) :

"The rule, as we understand it, is that, if it appears Congress has power over the subject matter of a statute, and if the findings of fact are not baseless but are based on extensive investigation, the courts are to adopt these findings."

It is apparent that the court below relied on an inapplicable rule. Legislative findings of fact, if not unreasonable, are conclusive for the purpose of supporting the policy of a particular law where its constitutionality is at issue. But this principle does not permit legislative findings to take the place of proof in an adversary proceeding that a specific organization or person is within the scope of the statute and thus subject to liability.

If the court's proposition were sound, Congress by making the necessary findings, could order petitioner to register under the Act and could impose sanctions on its members without any hearing whatsoever. We submit that review by this Court is required to determine whether due process permits such imposition of liability by legislative fiat.

2. As we have also seen (*supra*, p. 15), Section 2 pre-determines the existence in this country of a "Communist-action" organization having the major characteristics which, when supposedly found by the Board, determine the Board's decision. Nothing is left for the Board, therefore, but to supply the name of the organization which Congress had in mind as "the Communist-action organization in the United States." And the name itself was supplied in the legislative history of the Act, including the House and Senate reports accompanying the legislation (*supra*, p. 16). Thus the Board could not find that Petitioner was *not* the domestic "Communist-action" organization referred to in Section 2 without overruling Congress.<sup>58</sup>

<sup>58</sup> This Court has flatly held that "the Communist-action organization in the United States" referred to in section 2(15) refers to the petitioner herein. *Carlson v. Landon*, 342 U. S. 524, 535, 544.

Finally, petitioner was identified by name as a "Communist-action" organization by Section 4 of the Communist Control Act, enacted while the Court of Appeals had this proceeding under advisement.

The court below, however, rejected the contention that the Act violates due process because of its built-in finding that petitioner is a Communist-action organization. Its ground was that "Petitioner is not mentioned" (Op. 39), meaning apparently that petitioner is not mentioned by name in the text of the Act itself. We submit that the Court should review the question whether legislation which makes all necessary findings by fiat is valid merely because it does not name the accused in the text—even this omission being supplied in the legislative history and in subsequent legislation.

3. We urged below that the Act is invalid as a bill of attainder because it identifies petitioner as the object of the statutory sanctions and imposes punishment on petitioner and its members without a judicial trial, the Act providing only an administrative hearing as a prelude to liability. *Cummings v. Missouri*, 71 U. S. 277; *United States v. Lovett*, 328 U. S. 303; *Garner v. Board of Public Works*, 341 U. S. 716, 722. The court below rejected this contention (Op. 40) on the ground that the Act does not punish petitioner and its members for past conduct, but merely regulates their future conduct. However, the effect of a registration order is not to regulate petitioner's future conduct but to proscribe all of its activities, however innocent, and thus to punish it by destroying it altogether. Moreover, the order punishes petitioner's members by subjecting them to sanctions solely because of their membership and regardless of the fitness of the individual member, if judged on his merits, to enjoy the privileges which the Act denies him. This Court has consistently held that the deprivation of a privilege constitutes punishment where the grounds for the deprivation bear no reasonable relation

to the fitness of the individual to enjoy the privilege. *Cummings v. Missouri, supra*; *Ex parte Garland*, 71 U. S. 333; *Dent v. West Virginia*, 129 U. S. 114; *Hawker v. New York*, 170 U. S. 189.

Whether the sanctions of the Act are in fact punishment and whether the Act is therefore invalid as a bill of attainder are questions of fundamental importance which should be reviewed by this Court.

**B. Whether the Act violates due process because it authorizes a determination that an organization is a Communist-action organization on the basis of irrational and vague criteria.**

Legislation violates due process if it permits liability to be determined on the basis of criteria which are irrelevant to the ultimate issue or are too vague to supply an ascertainable standard of judgment. *Tot v. United States*, 319 U. S. 463; *Manley v. Georgia*, 279 U. S. 1; *Western and Atlantic R. R. v. Henderson*, 279 U. S. 639; *McFarland v. American Sugar Co.*, 241 U. S. 79; *Bailey v. Alabama*, 249 U. S. 219; *Burstyn v. Wilson*, 343 U. S. 495; *Winters v. New York*, 333 U. S. 507; *Niemotko v. Maryland*, 340 U. S. 268; *Kunz v. New York*, 340 U. S. 290; *Musser v. Utah*, 333 U. S. 95; *Stromberg v. California*, 283 U. S. 359; *Connally v. General Construction Company*, 269 U. S. 385.

Our previous analysis shows that the Act violates these principles. The standards which section 13(e) requires the Board to apply have no rational relation to the ultimate issue to be determined under Section 3(3) and are vague and indefinite (*supra*, pp. 16-18).<sup>59</sup>

<sup>59</sup> Messrs. John W. Davis, Charles Evans Hughes, Jr. and Seth W. Richardson advised the Senate Judiciary Committee that in their opinion the vagueness of the similar section of the Mundt-Nixon bill, the antecedent of the Act, rendered the entire bill unconstitutional. *Hearings before Senate Judiciary Committee*, 80th Cong., 2d Sess., on H. R. 5852, pp. 417, 421, 445.

The most striking instance of the irrationality of the Act is the fact that while Section 3(3) defines a Communist-action organization as one which promotes the seditious objectives attributed to the world Communist movement by Section 2, Section 13(e) authorizes the Board to issue a registration order without any proof whatsoever that the accused organization promotes seditious objectives. This fact was acknowledged below by the Board and accepted by the Court (*supra*, p. 17).

The court below attempted to meet the contention that Section 13(e) thus establishes an irrational system of proof, by stating (Op. 41-42):

"The Party says that by the definition in Section 2 of the Statute the world Communist movement engages in espionage, treason, etc., whereas none of the eight 'tests' to be applied to a domestic organization involves any of those offenses; and that thus the whole of Section 13(e) is irrational. The argument misconceives both the text and the purpose of the section. The inquiry with which the statute as a whole is concerned is in two separate parts: (a) What is the world Communist movement? That is dealt with in section 2. (b) Is a certain domestic organization under the domination and control of that movement, and does it operate primarily to achieve its objectives? . . . The so-called 'tests' in section 13(e) are directed at the latter problem alone. Thus construed, as it obviously was intended to be, the section is apt and cogent."

This passage begs the question. If one of the issues of "the latter problem" is whether the domestic organization operates to achieve the objectives of the world Communist movement, all of which, as enumerated in Section 2, are seditious and unlawful, that issue cannot rationally be resolved against the organization by proof that it operates to achieve only benign and lawful objectives.

The court below shifted its position when it discussed the "directives and policies" test of Section 13(e)(1), stating (Op. 44):

"The Party says that the 'directives and policies test' in Section 13(e)(1) is irrational. It says that the statutory definition of a Communist-action organization in Section 3(3) refers only to organizations which pursue objectives which are 'evil', whereas the test section refers to any objectives, good or bad.

. . . . .

The crucial factor in the statute before us is the aim, spelled out in detail, of the world Communist movement to disestablish our system of government. Our government may well oppose the establishment of a totalitarian dictatorship of the sort described in the definition, even if such a dictatorship does not meet the definition of 'evil' or even if it has many beneficent features."

But if "the crucial factor in the statute" is the alleged aim of the world Communist movement to disestablish our system of government, an accused organization cannot rationally be found to be a "Communist-action" organization in the absence of proof that it is engaged in promoting that aim. Yet no such proof is required by Section 13(e) or by any other section.

Moreover, the "crucial factor in the statute" is not simply the aim of the postulated world Communist movement to disestablish our system of government, but to do so by violent and unlawful means (e.g., Sec. 2(6)(15)). Indeed, it is only the latter factor which can support the finding of Section 2(15) that the American agent of the postulated world Communist movement presents "a clear and present danger to the security of the United States." Accordingly, an organization which operates to bring about a change in the existing social order in this country by peaceable and constitutional means cannot be a Communist-action organization. Yet none of the standards of Section 13(e) requires proof that petitioner operates to bring about social

change through the use of violent or unconstitutional means. There is, therefore, no rational relation between the finding that it is a Communist-action organization and the evidence upon which the Act authorizes the Board to predicate the finding. The decision below sustaining the validity of Section 13(e) is contrary to the decisions of this Court invalidating legislation which predicated civil or criminal liability on the basis of irrational presumptions.<sup>40</sup>

The court below also stated (Op. 42) that Section 13(e) does not preclude the Board from considering relevant and material evidence not within the standards of the section. That assertion, if true, cannot save the Act. The fact that the Act authorizes the Board to decide on the basis of irrational standards is enough to invalidate it. *Bailey v. Alabama*, 219 U. S. 219, 235. Moreover, the Board rested its decision exclusively on the standards of 13(e).

- C. Whether the Act violates due process by establishing a Board which is necessarily biased, and has an interest in deciding against petitioner, and whether petitioner was, in fact, denied a fair hearing."

As we have shown (*supra*, pp. 18-20), the structure of the Act is such that the Board could not have decided in favor of petitioner without rendering itself *functus officio* and, in effect, repealing the Act. Moreover, the Board members had a personal interest in ruling against petitioner in order to keep their jobs, salaries, and appointment patronage.

The Act thus exerted relentless pressures upon the Board to decide against petitioner. These pressures were reinforced by the surveillance of the conduct of the proceeding by an agent of the Senate committee, hostile to petitioner.

<sup>40</sup> The court below stated (Op. 43) that section 13(e) "is a catalog of some basic considerations. There are no statutory presumptions." Obviously, however, a statutory presumption consists in a grant of authority to a fact-finding body to infer and find the existence of an ultimate fact from proof of other facts. That is precisely the office of section 13(e).

which had pending before it the nominations of the Board members (*supra*, pp. 38-39).

The court below did not discuss petitioner's contention that it was denied due process by trial before a Board which was under irresistible pressure to decide against petitioner and had a personal interest in the outcome. *Tumey v. Ohio*, 273 U. S. 510; *United States ex rel. Accardi v. Shaughnessy*, 347 U. S. 260; *Wang Yang Sung v. McGrath*, 339 U. S. 33; *Fay v. New York*, 332 U. S. 261; *Morgan v. United States*, 304 U. S. 1.

The court below also failed to discuss petitioner's contention that the Board erred in refusing to disqualify Board Chairman Brown and Member McHale (both members of the hearing panel) for their unseemly conduct, during the administrative proceeding, in making public speeches about the case, in which they manifested bias and prejudgment. See *supra*, p. 39; *Berger v. United States*, 255 U. S. 22.

The Court should review the decision below to determine whether the affirmance of the Board's order conflicts with the cited decisions of the Court and with fundamental principles of procedural due process.

- D. Whether the Act violates due process by depriving petitioner's members of liberty and property merely by reason of their association, without proof of scienter and without according them a hearing.**

As we have seen (*supra*, pp. 8-9), under the Act, a final registration order against petitioner will bar its members from virtually all public and private employment, deprive them of other important privileges, and require their public listing as disloyal persons. The members suffer these onerous sanctions regardless of their personal innocence and lack of knowledge of the alleged character of petitioner. Furthermore, they are afforded no opportunity to demonstrate at a hearing that they are fit persons to enjoy the privileges denied them. Instead, the fact of member-

ship establishes a conclusive presumption of unfitness. In these respects, the Act seems clearly to violate due process under *Wieman v. Updegraff*, 344 U. S. 183, and *Adler v. Board of Education*, 342 U. S. 485. The Act also infringes the principle that guilt may not be imputed for association. *Schneiderman v. United States*, 320 U. S. 118; *Bridges v. Wixon*, 326 U. S. 135; *DeJonge v. Oregon*, 299 U. S. 353; *Herndon v. Lowry*, 301 U. S. 242.<sup>60a</sup>

The court below held that the scienter requirement of *Wieman* was satisfied on the grounds that (a) a member has knowledge of his membership; and (b), "The statute before us requires that before these sanctions apply a member must have 'knowledge or notice' that the organization has registered or been finally ordered to register" (Op. 26). These grounds are both irrelevant and untrue.

As *Wieman* makes abundantly clear, the scienter required by due process is knowledge that the organization has seditious purposes. The requirement is not satisfied by knowledge of membership or knowledge or notice that the organization has been governmentally condemned.<sup>61</sup>

Furthermore, in view of the vague criteria of membership established by Section 5 of the Communist Control Act, it is not correct that "members" have knowledge of their

<sup>60a</sup> It is clear, and neither the Board nor the court below disputed, that petitioner has standing to challenge the Act for denying due process to petitioner's members. The sanctions imposed on the members directly and seriously injure petitioner. The test of standing is thus satisfied, since it requires only that the action challenged affect the interests of the complainant in a reasonably direct manner. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123; *Pierce v. Society of Sisters*, 268 U. S. 510; *Truax v. Raich*, 239 U. S. 33; *Buchanan v. Warley*, 245 U. S. 60; *Barrows v. Jackson*, 346 U. S. 249.

<sup>61</sup> Moreover, knowledge of the issuance of a registration order does not carry knowledge that the organization has even been found to have seditious purposes, in view of the holding of the court below that a registration order may be issued without proof of such purposes (see *supra*, p. 17).

"membership". And it is a misreading of the statute to assume that knowledge or notice of a registration order<sup>42</sup> is a prerequisite to the imposition of the sanctions. Under the Act, such knowledge or notice is necessary to support criminal prosecutions for applying for a forbidden job or a passport or for a member's failure to register himself if the organization failed to list him (Sec. 5(a), 6(a), 8(b), 15(a)(2)). But even this limited "scienter" is not necessary to the imposition of the civil sanctions and disabilities of the Act. For employers must deny a member employment, the government must withhold a passport from him, and, if he is an alien, the government must deport him and may not naturalize him, all without reference to any kind of knowledge or notice on his part. See Secs. 6(b) and 5(a)(2) of the Act, and Sections 241(c)(6)(E) and 313(a)(2) of the Immigration and Nationality Act.

Clearly the decision below on this issue conflicts with applicable decisions of this Court and with fundamental principles of due process.

**E: Whether the registration requirement of the Act violates due process by virtue of the fact that Section 5 of the Communist Control Act makes it impossible to determine who must be registered as members.**

The Act makes it necessary for petitioner, its officers, and others to determine who are members of petitioner. If the order becomes final, petitioner and its officers must register the names of all the members. Other individuals must determine whether they are members in order to know whether they may lawfully hold certain jobs or apply for passports and whether they must register themselves upon failure of the organization to register their names. All persons making these determinations must apply the criteria for membership in the Communist Party provided by

<sup>42</sup> Under section 14(k), notice of a registration order is given to members by publication in the Federal Register of the fact that the order has become final.

Section 5 of the Communist Control Act, if they are to avoid the criminal penalties provided in Section 15 of the Act.

But, as we have seen (*supra*, p. 7), application of the criteria of Section 5 requires a knowledge of facts which petitioner and its officers cannot have. In addition, the criteria are vague and irrational. Consequently, petitioner and its officers cannot determine the identity of the members whom they are required to name in the registration statement. A final order of the Board, therefore, will leave petitioner and its officers hopelessly caught by the astronomically cumulative criminal penalties for omitting names from the registration statement and for false listings.

Other individuals are in the dilemma that they cannot tell from the vague criteria of Section 5 whether they are members of petitioner and thus subject to the requirements and penalties of the Act.<sup>63</sup>

The Court of Appeals dismisses Section 5, as well as the 1954 Act as a whole, with the statement (Op. 48) that, "we think it has no application." As to Section 5 at least, this statement is plainly erroneous.

We submit that the effect of Section 5 on the registration provisions of the Act presents constitutional questions of the highest public importance, which should be reviewed by this Court.

**F. Whether the Act is invalid because it violates the privilege against self-incrimination.**

Section 7(h) makes it the individual duty of the officers to register petitioner.<sup>64</sup> In the event there is no registra-

<sup>63</sup> The situation is aggravated by the fact that none of the section 5 criteria are limited as to time, so that a person can be found to be presently a member on the basis of some incident of the remote past.

<sup>64</sup> Regulations of the Attorney General under Sec. 7 require the registration statement to be signed by the organization's principal officers and all the members of the governing Board. 28 C. F. R. 11.205.

tion by the organization or its officers, or if the registration statement omits the names of any members, the members must register themselves (Sec. 8). Failure to register as required is punishable by severe criminal penalties (Sec. 15).

The legislative scheme of the Act therefore culminates in an attempt to coerce confessions of membership in the Communist Party and participation in the criminal conspiracies described in Sections 2 and 4(a) of the Act. This is a crass violation of the privilege against self-incrimination. *Blau v. United States*, 340 U. S. 159.

Congress recognized the vulnerability of the Act on this ground by including a so-called immunity provision (Sec. 4(f)). That provision cannot save the Act, however, since the limited immunity it confers is not co-extensive with the privilege. *Counselman v. Hitchcock*, 142 U. S. 547; *United States v. Bryan*, 339 U. S. 323.

A majority of the court below held that the privilege is not available to petitioner's officers and that its assertion at this time is premature (Op. 17-25). Both of these grounds are fully answered in Judge Bazelon's dissenting opinion (Op. 81-89), and it is therefore unnecessary to retrace the argument here.

The question presented is obviously novel and important, and should be reviewed by this Court.

**G. Whether the Act, on its face and as applied, violates the First Amendment.**

1. This Court has long held that statutes affecting speech, press and assembly must be narrowly drawn to meet a substantive evil which the legislature has power to control. A statute penalizing conduct or advocacy which lies outside the area protected by the First Amendment is nonetheless invalid if it is so broad that it likewise abridges protected expression or assembly. *United States v. C.I.O.*

335 U. S. 106; *Schneider v. Irvington*, 308 U. S. 147; *Thornhill v. Alabama*, 310 U. S. 88; *Cantwell v. Connecticut*, 310 U. S. 296, 308; *Jones v. Opelika*, 316 U. S. 584, 618 (dissenting opinion, adopted by the Court in *Jones v. Opelika*, 319 U. S. 103); *Saia v. New York*, 334 U. S. 558; *Winters v. New York*, 333 U. S. 507; *Stromberg v. California*, 283 U. S. 359; *DeJonge v. Oregon*, 299 U. S. 353; *Burstyn v. Wilson*, 343 U. S. 495; Cf. *Australian Communist Party v. Commonwealth*, 83 C. L. R. 1, 187-88, 225-27.

The Act violates this principle. Although its justification, stated in Section 2, is the alleged misconduct of "Communist-action" organizations, its controls are not limited to misconduct. Instead, as we have shown (*supra*, pp. 7-11), the Act and the order suppress all of petitioner's activities, including its admittedly extensive peaceable advocacy and assembly. As the President said in a special message to Congress, the Act attempts to "proscribe for certain groups such as the Communists, certain activities that are perfectly proper for everyone else" (H. R. Doc. No. 679, 81st Cong., 2d Sess., p. 6). Indeed, it is precisely peaceable conduct which the Act is designed to reach, since there is a plethora of other laws which punish seditious advocacy and provide for the registration of foreign agents.

In *American Communications Association v. Douds*, 339 U. S. 382, the Court sustained a limited control statute only because the legislation "did not restrain the activities of the Communist Party as a political organization" (at 404) or proscribe or severely burden membership in it. The Act does the very things condemned by *Douds*.

The court below acknowledged that the Act abridges First Amendment rights (Op. 11). It does not deny that a final registration order will outlaw petitioner (Op. 38-39). It states, however (Op. 39):

" \* \* \* If an organization is actually operating primarily to achieve the objectives of a foreign organization dedicated to the establishment of a totalitarian

dictatorship in this country by other than constitutional processes, we perceive no constitutional obstacle to its outlawry."

This statement is plainly erroneous.<sup>65</sup> The facts assumed by the court would at most justify legislation penalizing the use or advocacy of "other than constitutional processes" for achieving the stated objective. They could not justify the proscription of peaceful advocacy and assembly by outlawing the organization.

The court below also stated (Op. 11):

"The activities of a world Communist movement such as that described in this statute and of organizations in this country devoted to its objectives constitute a clear and present danger within the meaning of any definition of the point at which freedom of speech gives way to the requirements of government security."

This repeats the error of the previous excerpt. The fact, if it be one, that an organization is engaged in "dangerous" activities cannot warrant the suppression of its innocent and lawful advocacy and assembly. Moreover, the clear and present danger exception applies only to expression which, because of its content and under the circumstances of its dissemination, gives rise to danger. The Act, and the Board's order, however, restrain all of petitioner's future advocacy, regardless of its possible content and of the circumstances under which it may be disseminated.

The court below also held that the employment and passport sanctions of the Act are, when considered severally, reasonably related to the evil which Congress was attempting to reach and therefore do not violate the First Amendment (Op. 33-35). Undoubtedly, federal power exists to protect the government service and establishments vital to

<sup>65</sup> It is also inapplicable, since, as the court below held, the Act does not require proof of the use or advocacy of unconstitutional means as a prerequisite to outlawry by a registration order (see *supra*, p. 17; *infra*, p. 64).

the national defense against espionage, sabotage and other criminal activities as well as to prohibit foreign travel for the effectuation of any such illegal enterprise. The Act, however, forecloses employment to a member and bars him from travel abroad notwithstanding his personal innocence, lack of criminal propensities and lack of guilty scienter (see *supra*, pp. 56-57). Furthermore, as the court below acknowledged, the Act does not require proof that either the organization, or any of its members has engaged in or advocated espionage, sabotage or other violent or unconstitutional means for the achievement of its political objectives (see *supra*, p. 17). It is clear, therefore, that the function of these sanctions, even when considered individually and apart from their setting in the Act as a whole, is not to protect the national security. Such protection, if needed, could have been provided by narrowly-drawn legislation addressed to that purpose. The Act's sanctions serve a different function, that of destroying the petitioner by denying its members their livelihood and liberties merely because of their membership.

(2) The Act imposes a prior restraint on protected speech, press and assembly. The Act and the order require petitioner to register as a criminal conspirator before it can engage in political advocacy. They also require petitioner to list all printing presses, mimeograph machines, etc., in its possession or that of its officers, members or groups in which it "has an interest" (Sec. 7(d)(6)).<sup>60</sup> Petitioner must also identify its publications and broadcasts with an invidious label whether or not it registers (Sec. 10). This requirement applies regardless of the content of the expression or the circumstances under which it occurs. Petitioner's exercise of the rights of speech and press is licensed not because its words are seditious or create a clear

<sup>60</sup> The court below ignores this amendment to the Act, characterized by the *Chicago Daily News* as "a part-way throwback to concepts of press licensing obsolete in the English-speaking world for centuries." 100 Cong. Rec. 14401.

and present danger, but solely because they emanate from petitioner.

The decision below therefore conflicts with this Court's condemnation of prior restraints on First Amendment rights. *Thomas v. Collins*, 323 U. S. 516, 540, expressly condemns "the device of requiring previous registration as a condition for exercising" the rights of free speech and assembly. See also *Burstyn v. Wilson*, 343 U. S. 495; *Lovell v. Griffin*, 303 U. S. 444; *Largent v. Texas*, 318 U. S. 418; *Hague v. C.I.O.*, 307 U. S. 496; *Cantwell v. Connecticut*, 310 U. S. 296; *Schneider v. Irvington*, 308 U. S. 147.

The court below distinguished *Thomas v. Collins* on the ground that "operation to achieve the objectives of a movement such as this statute describes is conduct sufficient to invoke Federal regulatory power" (Op. 14). The "objectives" referred to by the court are presumably the criminal and seditious objectives described in Section 2. Accordingly, the attempted distinction is fallacious, since the prior restraint of the Act is not limited to seditious advocacy, or even to advocacy by organizations which have been proved to have seditious objectives.

The court below equates the registration and labelling requirements of the Act with statutes requiring the registration of lobbyists and foreign agents and the identification of those who use the mails and the radio (Op. 32-33; 35-36). Those statutes, however, are non-discriminatory and non-invidious, whereas the Act's registration and labelling requirements are armband measures condemned in *American Communications Ass'n v. Douds*, *supra*, at 402. Moreover, in construing the statutes referred to by the court below, this Court has for constitutional reasons confined the controls to highly limited areas. *United States v. Harris*, 347 U. S. 612; *Viereck v. United States*, 318 U. S. 236. The Act is not, and cannot be, so confined.

(3) The Act imposes sanctions upon an organization and its members on the basis of evidence of lawful and peaceable political advocacy and views.

The standards of Section 13(e) focus on views and policies and their expression. Thus the first standard refers to the method of formulation and the purpose of policies, the second to "non-deviation" of views and policies, the fourth to teaching, and the fifth to reporting. The views and policies need not be seditious or even false. Nor does the section require proof that petitioner advocates violent or unconstitutional means for the effectuation of its policies.

Congress cannot control even the advocacy of violence in the absence of a clear and present danger situation. *Dennis v. United States*, 341 U. S. 494. Much less, therefore, can it punish an organization or its members upon evidence that the former advocates peaceable action, as to which no clear and present danger can arise.

The court below recognized (Op. 44-46) that none of the standards of Section 13(e) requires a showing of criminal activities or advocacy of violent or unconstitutional means. Nevertheless, the court states (Op. 44):

"Our government may well oppose the establishment of a totalitarian dictatorship of the sort described in the definition, even if such dictatorship does not meet the definition of 'evil' or even if it has many beneficent features."

The issue in this case, however, is not whether the government may "oppose" a radical political change but whether it may impose sanctions for the advocacy of such change. If the First Amendment does anything, it prohibits the national government from abridging such advocacy so long, at least, as the means advocated are non-violent or no clear and present danger exists. *Stromberg v. California*, 283 U. S. 359; *Gitlow v. New York*, 268 U. S. 652, 673 (Holmes, J., dissenting); *Schneiderman v. United States*, 320 U. S.

118. The decision below is inconsistent with the principle established by these cases.

(4) Passing to the Act as applied, it is clear that the evidence on which the court below relied to sustain the ultimate finding of the Board consists of petitioner's views and policies. As we have seen, the court sustained the ultimate finding primarily on the basis of six factors. These deal exclusively with petitioner's adherence to Marxism-Leninism and its position on international questions (*supra*, pp. 33-34). Except as to "financial aid," the same thing is true of the evidence on which the court relied in sustaining the Board's findings under Section 13(e) which survived review (see *supra*, pp. 27-32). None of these views involve, or are found to involve, advocacy of violent or unconstitutional methods.

In essence, the court below sustained the registration order on the grounds that petitioner adheres to a school of political thought that believes in and works for "a classless, stateless world" and that petitioner's views on international questions are similar to those of the Soviet Union. Thus, applying the Act in accordance with its real purpose, the court sustained a death sentence against petitioner because it holds views that are presently unorthodox and unpopular.

If the decision below is allowed to stand, there remain no effective limitations on Congress' control over political expression. If Congress can punish "non-deviation" from Soviet views, it can penalize "non-deviation" from other views. In fact, the Communist-front provisions of the Act already punish "non-deviation" from petitioner's views (Sec. 13(f)). The decision below thus gives legal sanction to the pernicious current technique of condemning persons because some of their views "parallel" those of the Soviet Union or of Communists.<sup>87</sup>

<sup>87</sup> Robert Maynard Hutchins, when chancellor of the University of Chicago, stated: "It is now fashionable to call anybody with whom you disagree a Communist or a fellow-traveller. So Branch Rickey

This proceeding outdoes the heresy trials of earlier times. Heretics were burned for believing doctrines held to be false and wicked. The Act, however, as applied by the Board and the court below, punishes political heretics for promulgating doctrines which concededly may be true and good. It creates the strangest and most virulent of heresies—"non-deviation," including "non-deviation" from the truth.

Clearly, the question whether the Act, on its face and as applied, violates the First Amendment requires review by this Court.

**III. The action of the court below in sustaining the order of the Board after striking two of the key findings on which it was based violates the Act and is in conflict with applicable decisions of this Court.**

As we have seen (*supra*, p. 24), the Board rested its decision that petitioner is a Communist-action organization on findings adverse to petitioner under each of the eight criteria of Section 13(e). Since the Board's ultimate conclusion was based on the totality of these eight findings, it cannot be said that the same conclusion would have been

darkly hinted the other day that the attempt to eliminate the reserve clause in baseball contracts was the work of Communists. One who criticizes the foreign policy of the United States, or the draft, or the Atlantic Pact, or who believes that our military establishment is too expensive can be called a Fellow Traveller, for the Russians are of the same opinion. One who thinks that there are too many slums and too much lynching in America can be called a Fellow Traveller, for the Russians say the same. One who opposes racial discrimination or the Ku Klux Klan can be called a Fellow Traveller; for the Russians claim that they ought to be opposed. Anybody who wants any change of any kind in this country can be called a Fellow Traveller, because the Russians want change in this country, too . . . The miasma of thought-control that is now spreading over the country is the greatest menace to the United States since Hitler." (Hearings of Illinois Seditious Activities Investigation Commission on University of Chicago and Roosevelt College, April 1949, pp. 20-21).

reached if any of the findings had been omitted or had been to the contrary effect.

The court below struck the findings of the Board under the "reporting" and "secret practices" criteria of Section 13(e) on the ground that they were not supported by a preponderance of the evidence (Op. 72-74). Accordingly, the premises on which the Board acted do not support its conclusion, since it based its order on the sum of eight findings, not on six. Moreover, two of the six surviving findings had little if any weight against petitioner.<sup>68</sup> Nevertheless, the court below affirmed the order of the Board, instead of remanding for administrative redetermination in the light of the findings which survived.

This action violates Section 14 of the Act, which permits affirmance of an order of the Board only if the findings of the Board are supported by a preponderance of the evidence. The decision below also conflicts with the decisions of this Court that an administrative order cannot be upheld unless the grounds on which the agency acted to sustain its action. If the agency's ultimate conclusion rests in part on invalid subsidiary findings of fact, the reviewing court must remand the proceeding for agency redetermination. This is the appropriate action even though the reviewing court is of the opinion that the agency action could have been supported by valid subsidiary findings. *National Labor Relations Board v. Virginia Electric & Power Co.*, 314 U. S. 469; *S.E.C. v. Chenery Corp.*, 318 U. S. 80; *F.P.C. v.*

<sup>68</sup> The Board found that "financial aid" and "instruction and training" were not currently engaged in by petitioner (R. 88, 92). It advised the court below that "the Board could not have placed great reliance" on the "financial aid" criterion (Respondent's Br. below, p. 101). The court below recognized that the "financial aid" and "instruction and training" criteria had no great materiality to the ultimate issue (Op. 46).

*Idaho Power Co.*, 344 U. S. 17; *Colorado-Wyoming Gas Co. v. F.P.C.*, 324 U. S. 626.<sup>89</sup>

The decision below establishes a precedent for future cases arising under the Act that the reviewing court will proceed as though it were the administrative agency and the Board its trial examiner. We submit that the decision represents an important departure from basic principles of administrative law which requires review by this Court.

IV. The decision below determines important questions concerning the interpretation and application of the Act. Some of these have not been, but should be, settled by this Court, and others were decided in a manner which conflicts with applicable decisions of this Court.

A. Whether the order of the Board and the decision below violate the Act for the reason that they rest on alleged conduct of petitioner which, if it ever occurred, was discontinued prior to the date of the Act.

As we have seen (*supra*, p. 24), the Act makes it the duty of the Board to determine whether an accused organization is a Communist-action organization at the time of the proceeding. Moreover, the Board was precluded from basing its order upon practices of petitioner which antedated the Act by the principle which favors the prospective construction of legislation and by constitutional considerations. *White v. United States*, 191 U. S. 545, 552; *Shreveport v. Cole*, 129 U. S. 36; *Cummings v. Missouri*, 71 U. S. 277; *Pierce v. Carskadon*, 83 U. S. 234; *Burgess v. Salmon*, 97 U. S. 381.

Accordingly, the Board was required to base its findings and order upon current conduct of the petitioner. Peti-

<sup>89</sup> The action of the court below is also in conflict with its own decisions. *Democrat Printing Co. v. F. C. C.*, 202 F. 2d 298; *Mississippi River Fuel Corp. v. F. P. C.*, 163 F. 2d 433, 449.

tioner's practices prior to the date of the Act were relevant, if at all, only to the extent that they served to show or explain the purpose or character of post-Act activities. *Federal Trade Commission v. Cement Institute*, 333 U. S. 683, 705.<sup>70</sup>

There was no relevant post-Act evidence which could rationally support a registration order. The Board and the Court below compensated for this deficiency of proof by treating as determinative evidence of matters in the remote past which had been long abandoned, as, for example, petitioner's affiliation before 1940 with the Communist International. And findings unfavorable to petitioner were made and sustained on the "financial aid" and "instruction and training" standards of Section 13 (even though these practices, if ever engaged in, were found by both the Board and the court below to have been discontinued well before enactment of the Act (see *supra*, pp. 25-26)).

The Board rationalized its reliance on evidence of petitioner's practices prior to the date of the Act by invoking a vague presumption of "continuance" (R. 130). It nowhere identified the pre-Act evidence on which it relied as the foundation of the presumption or the nature of the pre-Act conduct presumed to have continued.<sup>71</sup> Moreover, continuance cannot be presumed in the face of petitioner's uncontradicted denials (Op. 51-52; R. 1211-27, 1235-41, 1282-84, 1288-91). "At most," a presumption of continuance "is but a rebuttable presumption which cannot be weighed in the balance as against evidence." *Sherman Inv. Co. v.*

<sup>70</sup> This decision states (at 706) that evidence of past transactions is not admissible even for this limited purpose where, as here, the effect of the proceeding is "to punish or to fasten liability on respondents for past conduct."

<sup>71</sup> The irrationality of the Board's approach is illustrated by the fact that it found that foreign instruction and training stopped in 1936 (R. 90, 92), some fourteen years before the Act. If there is an applicable "presumption," it should be one of discontinuance, not of continuance.

*United States*, 199 F. 2d 504, 507 (8th Cir.). Nor can continuance be presumed in the face of such changes in circumstances as petitioner's disaffiliation from, and the subsequent dissolution of, the Communist International. See 2 Wigmore on Evidence (3d ed.), Sec. 437. Neither can it be presumed that conduct permissible at the time of occurrence continued after passage of legislation imposing sanctions for such conduct. *Federal Trade Commission v. Cement Institute*, *supra*; *Wolf v. United States*, 259 Fed. 388 (8th Cir.); *Haywood v. United States*, 268 Fed. 795 (8th Cir.).

The court below also invoked a presumption of continuance. It found that "in the years prior to 1940 the Communist Party USA was dominated and controlled by the world Communist movement" because during that period petitioner was affiliated with the Communist International and bound by its decisions (Op. 61-3). It then held that petitioner's past affiliation with the Communist International was decisive of its present status as a Communist-action organization, notwithstanding its own findings that the petitioner disaffiliated from the International in 1940 and that the International was dissolved in 1943 (Op. 64). The court's theory was that the past conduct of an organization is material to its present nature in the absence of "affirmative evidence of a departure from the established past" (Op. 63). It found that petitioner's disaffiliation from the Communist International and the latter's dissolution did not constitute such a "departure," stating:

"To demonstrate a changed nature in the Party USA, some assertion of a change in substantive belief and program would have to be made" (Op. 64).

. . . . .

"If the Communist Party USA does not adhere to the basic ultimate objective of Marxism-Leninism [i.e. 'a classless, stateless world'], some vivid evidence to that effect should be readily available . . . . But this record contains no such evidence" (Op. 66).

The Act, however, relates to an organization which is *currently* under foreign control. Obviously, control cannot be established by proof of voluntary adherence to doctrine. The court acknowledged that the Communist International, which it asserted once controlled petitioner, was dissolved in 1943. By the court's own admission, therefore, nothing now remains but voluntary continued adherence to doctrine. Nevertheless, the court presumed the continuance of the control from petitioner's failure to repudiate the doctrine. This is a palpable non sequitur and a violation of the Act.

*United States v. Dennis*, 183 F. 2d 201 (2d Cir.), goes further than any of the other authorities in the significance it attaches to evidence of conduct prior to the period in issue. But even *Dennis* recognizes (at 231): "It is *toto coelo* a different question whether we are treating them [acts performed prior to the critical period] as *media concludendi* or as the *factum* itself." Contrary to *Dennis*, both the Board and the Court treated pre-Act conduct as "the *factum* itself."

The principles stated and applied by the Board and the court below as to the function of pre-Act evidence violate the Act and conflict with principles established by decisions of this Court and by other Circuits.

**B. Whether the Board and the court below otherwise erroneously construed and applied the criteria of Section 13(e) of the Act.**

The construction and application by the Board and the court below of the evidentiary criteria of section 13(e) present novel questions of major importance to the administration of the Act.

The common denominator of the standards of Section 13(e) as construed by the Board and the court below, is that they can be satisfied by proof of an organization's adherence to Marxism-Leninism and a similarity of its views

on various international questions to those of the Soviet Union (*supra*, pp. 27-34). This becomes apparent from a closer examination of the application given to the "directives and policies," "non-deviation," "discipline," and "allegiance" criteria.<sup>72</sup> This application is untenable even under the purposefully loose terms of 13(e).

"*Directives and policies.*" The Report and the court's opinion reveal that there was no evidence whatsoever that petitioner receives directives from the Soviet Union.<sup>73</sup> The Board however, found that the "directives" standard was satisfied primarily on the basis that the body of Communist literature on its face constitutes a series of "directives" from the Soviet Union to petitioner (*supra*, pp. 27-28). The court below sustained the Board's finding (Op. 70-1).

The thesis that a century-old, constantly evolving system of political thought, developed by thinkers of many nations and based on a comprehensive view of man and nature, constitutes a series of Soviet "directives" is absurd. Its absurdity is underscored by the Board's and the court's characterization of the doctrine as an "amorphous amalgam" permitting "a wide flexibility of tactics," "applicable under an endless variety of circumstances," and having an overall policy of doing "what is expedient under the given circumstances" (*supra*, p. 28).

Obviously, Marxism-Leninism cannot be a "directive" within the meaning of Section 13(e)(1). Nor can voluntary adherence to and application of its principles make the adherent subject to foreign control within the mean-

<sup>72</sup> As to the remaining criteria, the court struck the Board's findings on "reporting" and "secret practices" (*supra*, p. 24), and both the Board and the court acknowledged that the findings on "financial aid" and "training" rested exclusively on remote evidence and have little weight (*supra*, p. 67).

<sup>73</sup> The Board found that prior to petitioner's disaffiliation from the Communist International in 1940, decisions and resolutions of that body were "directives" to petitioner (R. 11). The court apparently shared that view (Op. 74).

ing of Section 3(3). In holding otherwise, the Board and the court below violated the Act and applied it in a manner prohibited by the First and Fifth Amendments. A

**"Non-deviation."** The standard of Section 13(e)(1) relates to "non-deviation" of views. The dictionary definition of "deviation" is "variation from the common way, from an established standard, position, etc." (Webster's *New International Dictionary*). Accordingly, deviation or non-deviation cannot occur unless there is a *pre-existing* standard or position from which it is possible to deviate.

The evidence showed that petitioner and the Soviet Union held similar views on a series of international issues. However, no showing was made or attempted that the Soviet view on any of these issues antedated petitioner's view. Nevertheless, both the Board and the court held that the non-deviation standard was satisfied, on the ground that the date sequence of the views was irrelevant (*supra*, p. 29). This holding is not only contrary to the plain language of the Act, but is also irrational. For it rests findings of foreign control on a similarity of views even though the alleged agent adopted its views in advance of the adoption of similar views by the alleged foreign principal.

The Board and the court below made still further irrational applications of the "non-deviation" standard. If non-deviation of views is to have any significance as proof of foreign agency, clearly it must be limited to views which are peculiar to the alleged principal. It would be absurd to infer domination of one person by another from the fact that both believe that the sum of two and two is four. Nevertheless, the Board and the court held that the non-deviation test was satisfied on the basis of views which were widely held by non-Communists, including in some instances the United States government, and which were demonstrably true or reasonable (*supra*, p. 29).

Moreover, "non-deviation" is at best tenuous circumstantial evidence of domination and control. Nevertheless, the

hearing panel refused to allow the petitioner to rebut any inference from the similarity of its views and those of the Soviet Union by showing that the similarity was attributable, not to control of petitioner by the Soviet Union, but to the independent application by each of a system of thought held by all Communists. The Board, after affirming this irrational ruling of the panel, blandly found that the evidence failed to establish the fact that petitioner was thus prevented from proving (*supra*, p. 30).

Finally, it was obviously irrational for the Board to rely on perfectly legitimate views on political questions, some of which were in fact adopted as the official policy of the United States government, as one of the bases for the ultimate conclusion that petitioner operates to promote the seditious objectives attributed to the world Communist movement by Section 2 (see *supra*, p. 30).

**"Discipline."** The Board's adverse finding under the "discipline" standard rested, and was affirmed, on instances of petitioner's discipline of certain members, concerning which there is no evidence or suggestion of foreign intervention, and on the Communist principle of democratic centralism, which relates only to the internal management of an organization, and thus has no bearing on foreign control (*supra*, p. 32). By predicating the finding on the fact that petitioner and other Communist parties practice the principle of democratic centralism, the Board and the court below assimilated the "discipline" criterion to their version of the "non-deviation" standard. Petitioner was held subject to foreign discipline, and hence under foreign domination and control, because both it and the Communist Party of the Soviet Union, like the Communists of all countries, believe that members of their parties should be bound to strict adherence to majority decisions.

**"Allegiance."** The Board's adverse finding on "allegiance," and the court's affirmance of the finding, rest primarily on the Marxist-Leninist literature which was con-

sidered in *Schneiderman v. United States*, 320 U. S. 118, and which, this Court held, did not support a finding that adherence to Marxism-Leninism is incompatible with attachment to the principles of the Constitution and being well disposed to the good order and happiness of the United States (*supra*, p. 32).

Manifestly, the Board and the court violated the Act in their construction and application of the standards of Section 13(e), did nothing to rescue the section from invalidity by confining it within rational limits, and contravened the *Schneiderman* decision. This Court should review the decision below to correct these errors and to prevent their repetition in future cases arising under the Act.

**C. Whether the Board and the court below erroneously construed and applied the Act's definition of the world Communist movement.**

We have already seen (*supra*, p. 15) that the court below held that the findings of Section 2 of the Act with reference to the existence and nature of a world Communist movement are conclusive upon the Board and the courts.<sup>74</sup> Nevertheless, the court reviewed and sustained the finding of the Board that, on the evidence, "there exists a world Communist movement substantially as described in section 2 of the Act" (Op. 61).

It is clear that the Board and the court below erroneously construed and applied Section 2 in concluding that the presence in various countries of the world of Communist parties which adhere to a common ideology establishes the existence of the world Communist movement described in that section (*supra*, pp. 34-36).

<sup>74</sup> The Board straddled the question. "It first stated (R. 4) that it was "desirable" to make findings as to the world Communist movement. Then it stated (R. 130) that it was unnecessary to decide whether such findings are required by the Act inasmuch as it had already made them.

If this Court concludes that the existence of the world Communist movement described in Section 2 was a matter for determination by the Board, it is important that it review the affirmance below of the Board's finding.<sup>75</sup> For the entire structure of the Act and its justification for the sanctions on petitioner, its members, other organizations and their members is predicated on the validity of the finding.<sup>76</sup>

**D. Whether the court below violated section 14 of the Act by denying petitioner's motion for leave to adduce additional evidence.**

As we have seen (*supra*, p. 40), petitioner's motion for leave to adduce additional evidence showed that three of the Attorney General's professional witnesses, Crouch, Johnson and Matusow, upon whose testimony the Board relied for material findings of fact, had committed perjury in other proceedings<sup>77</sup> and that because of their publicly demonstrated untrustworthiness the Attorney General had ceased to employ them as witnesses. As we have also seen (*ibid.*) the Board itself recognized in *Brownell v. Labor*

<sup>75</sup> If, as we and the court below interpret the Act, this matter is not a subject for administrative adjudication, then the Act is palpably unconstitutional as fiat legislation (*supra*, pp. 47-51), and review is required for that reason.

<sup>76</sup> Section 2 paraphrases Hitler who declared: "The Communist Party was a section of a political movement which had its headquarters abroad and was directed from abroad . . . We look on Bolshevism as a world peril for which there must be no toleration." *Nazi Conspiracy and Aggression*, U. S. Gov't Printing Office, 1946, vol. 1, p. 246. The United States was once the subject of "findings" like those which section 2 makes about the Soviet Union: Thus, Count Metternich charged in 1820 that, "These United States \* \* \* have cast blame and scorn on the institutions of Europe most worthy of respect . . . fostering revolution wherever they show themselves . . . they lend new strength to the apostles of sedition, and reanimate the courage of every conspirator." Quoted in Dexter Perkins, *Hands Off! A History of the Monroe Doctrine*, Boston, 1941, pp. 56-57.

<sup>77</sup> Matusow subsequently admitted that his testimony in this proceeding was perjurious (see *supra*, p. 41).

Youth League, that the facts stated in petitioner's motion with reference to Matusow make him unworthy of any credence whatsoever.

The Board nevertheless opposed petitioner's motion<sup>18</sup> and the court below denied it without opinion (R. 2082). The action of the court in so doing violates Section 14 of the Act. Section 14 requires the allowance of a motion to adduce additional evidence upon a showing that such evidence is material—i.e. that it might change the result reached by the agency. Clearly, the testimony in this proceeding of the three informers in question was material since, as is apparent from the face of the Report, the Board relied extensively on their testimony in making its subsidiary findings of fact. The additional evidence proffered by petitioner would have completely destroyed or at least seriously impaired the credibility of this material testimony. Obviously, therefore, the additional evidence was itself material.

The decision below not only violates Section 14 but is inconsistent with the decision of this Court applying a similar section of the National Labor Relations Act. *NLRB v. Indiana and Michigan Electric Co.*, 318 U. S. 9.

Furthermore, petitioner's motion presents an issue of great public importance concerning the testimony of professional informers. The reckless use by the Department of Justice of these informers in "security" cases is compromising the administration of justice. It has aroused widespread apprehension and alarm, particularly in the light of current revelations of the untrustworthiness of testimony which the government has bought and paid for. As has recently been stated (N. Y. Times editorial, July 8, 1954):

<sup>18</sup> Cf. the recent televised statement by the Attorney General that when one of the government's informer witnesses is found to be unreliable, "then it is the government's obligation to follow up to see that he is punished and that anybody who has been hurt by his testimony, if it's false, is given a new chance." New York World-Telegram, March 28, 1955.

"If the Department of Justice feels it essential to use informers in its anti-Communist prosecutions under the law, it has the unmistakable duty to follow up relentlessly any indication that they may not be telling the truth. As the law enforcement agency of our government, the Department of Justice has a primary obligation to maintain its own integrity and that of its agents."

When the Department of Justice and administrative agencies are derelict in this obligation, the courts should be scrupulous to enforce it by insisting, at a minimum, that the evidence of perjury be heard and considered. The failure of the court below to take this minimal action should be reviewed if the abuse of the judicial process through hired informers is to be curbed and the liberties of individuals and organizations safeguarded against false testimony.

E. Whether the findings of the Board are unsupported by the preponderance of the evidence, and whether the Report of the Board and the opinion of the court below demonstrate on their face the insufficiency of the evidence.

Section 14(a) of the Act provides that upon review the Board's findings as to the facts are conclusive only if supported by the preponderance of the evidence. The court below found that the order was supported by the preponderance of the evidence (Op. 76).

As we have seen, the authors of the Act realized that relevant evidence was not available to prove that petitioner is a Communist-action organization. They therefore designed the standards of section 13(e) to guarantee the issuance of a registration order upon irrelevant evidence which they believed was available (*supra*, pp. 16-18). It developed at the hearing, however, that the Attorney General was unable to produce even the irrelevant evidence on which the Act's sponsors had counted.

It was for this reason that, as we have seen and as appears from the face of the Report, the Board was compelled to exaggerate the irrationalities of section 13(e), to impute sinister significance to patently legitimate conduct, to distort the century-old body of Communist theory into "directives" from the Soviet Union, to rely on evidence of remote practices admittedly long discontinued, to utilize protected political expression as "evidence" of seditious foreign agency, and otherwise to substitute prejudice and prejudgment for proof. For the same reason, the Board relied on the testimony of the Attorney General's professional informer witnesses notwithstanding their demonstrated lack of veracity (*supra*, p. 22).

Nevertheless, the court below affirmed the order of the Board. It did so even though it struck two of the key findings on which the order was based, on the ground that they were not supported by the preponderance of the evidence. The court's affirmance was based on what it called six underlying "basic facts," which do not satisfy the standards of section 13(e) or the 3(3) definition (*supra*, pp. 33-34).

Review of the preponderance questions is demanded not only because of the manifest errors of the Board and the court below and because of the unprecedented effect of the order in outlawing a political party. It is also required because the finding against petitioner concludes the rights of other organizations. The Act contemplates that once the petitioner is finally found to be a Communist-action organization, that issue cannot be relitigated by organizations accused of being Communist-front or infiltrated. And so the Board has recently held. In issuing its first registration order against an organization accused of being a Communist-front, it held that "the prior determination by the Board that the Communist Party is a Communist-action organization is conclusive and applicable in this proceeding without further proof." Report of the Board, *Brownell v. Labor Youth League*, No. 102-53, Feb. 15, 1955, pp. 54-55.

any officer or employee of the United States or of any department or agency thereof or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, any information of a kind which shall have been classified by the President (or by the head of any such department, agency, or corporation with the approval of the President) as affecting the security of the United States, unless special authorization for such communication shall first have been obtained from the head of the department, agency, or corporation having custody of or control over such information.

(d) Any person who violates any provision of this section shall, upon conviction thereof, be punished by a fine of not more than \$10,000, or imprisonment for not more than ten years, or by both such fine and such imprisonment, and shall, moreover, be thereafter ineligible to hold any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

(e) Any person may be prosecuted, tried, and punished for any violation of this section at any time within ten years after the commission of such offense, notwithstanding the provisions of any other statute of limitations: *Provided*, That if at the time of the commission of the offense such person is an officer or employee of the United States or of any department or agency thereof, or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, such person may be prosecuted, tried, and punished for any violation of this section at any time within ten years after such person has ceased to be employed as such officer or employee.

(f) Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of

the registration of any person under section 7 or section 8 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute.

#### EMPLOYMENT OF MEMBERS OF COMMUNIST ORGANIZATIONS

SEC. 5. (a) When a Communist organization, as defined in paragraph (5) of section 3 of this title, is registered or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful—

(1) For any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(A) in seeking, accepting, or holding any nonelective office or employment under the United States, to conceal or fail to disclose the fact that he is a member of such organization; or

(B) to hold any nonelective office or employment under the United States; or

(C) in seeking, accepting, or holding employment in any defense facility, to conceal or fail to disclose the fact that he is a member of such organization; or

(D) if such organization is a Communist-action organization, to engage in any employment in any defense facility; or

(E)<sup>3</sup> to hold office or employment with any labor organization, as that term is defined in section 2(5) of the National Labor Relations Act, as amended (29 U. S. C. 152), or to represent any employer in

<sup>3</sup> Added by sec. 6 of the Communist Control Act of 1954, 68 Stat. 777.

any matter or proceeding arising or pending under that Act.

(2) For any officer or employee of the United States or of any defense facility, with knowledge or notice that such organization is so registered or that such order has become final—

(A) to contribute funds or services to such organization; or

(B) to advise, counsel or urge any person, with knowledge or notice that such person is a member of such organization, to perform, or to omit to perform, any act if such act or omission would constitute a violation of any provision of subparagraph (1) of this subsection.

(b) The Secretary of Defense is authorized and directed to designate and proclaim, and from time to time revise, a list of facilities, as defined in paragraph (7) of section 3 of this title, with respect to the operation of which he finds and determines that the security of the United States requires the application of the provisions of subsection (a) of this section. The Secretary shall cause such list as designated and proclaimed, or any revision thereof, to be promptly published in the Federal Register, and shall promptly notify the management of any facility so listed; whereupon such management shall immediately post conspicuously, and thereafter while so listed keep posted, notice of such designation in such form and in such place or places as to give reasonable notice thereof to all employees of, and to all applicants for employment in, such facility.

(c)<sup>4</sup> As used in this section, the term "member" shall not include any individual whose name has not been made public because of the prohibition contained in section 9(b) of this title.

<sup>4</sup> Repealed by sec. 7(c) of the Communist Control Act of 1954, 68 Stat. 778.

## DENIAL OF PASSPORTS TO MEMBERS OF COMMUNIST ORGANIZATIONS

SEC. 6. (a) When a Communist organization as defined in paragraph (5) of section 3 of this title is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

(2) to use or attempt to use any such passport.

(b) When an organization is registered, or there is in effect a final order of the Board requiring an organization to register, as a Communist-action organization, it shall be unlawful for any officer or employee of the United States to issue a passport to, or renew the passport of, any individual knowing or having reason to believe that such individual is a member of such organization.

(c)<sup>5</sup>As used in this section, the term "member" shall not include any individual whose name has not been made public because of the prohibition contained in section 9(b) of this title.

## REGISTRATION AND ANNUAL REPORTS OF COMMUNIST ORGANIZATIONS

SEC. 7. (a) Each Communist-action organization (including any organization required, by a final order of the Board, to register as a Communist-action organization) shall, within the time specified in subsection (c) of this section,

<sup>5</sup> See footnote 4.

register with the Attorney General, on a form prescribed by him by regulations, as a Communist-action organization.

(b) Each Communist-front organization (including any organization required, by a final order of the Board, to register as a Communist-front organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-front organization.

(c) The registration required by subsection (a) or (b) shall be made—

(1) in the case of an organization which is a Communist-action organization or a Communist-front organization on the date of the enactment of this title, within thirty days after such date;

(2) in the case of an organization becoming a Communist-action organization or a Communist-front organization after the date of the enactment of this title, within thirty days after such organization becomes a Communist-action organization or a Communist-front organization, as the case may be; and

(3) in the case of an organization which by a final order of the Board is required to register, within thirty days after such order becomes final.

(d) The registration made under subsection (a) or (b) shall be accompanied by a registration statement, to be prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the following information:

(1) The name of the organization and the address of its principal office.

(2) The name and last-known address of each individual who is at the time of filing of such registration statement, and of each individual who was at any time

during the period of twelve full calendar months next preceding the filing of such statement, an officer of the organization, with the designation or title of the office so held, and with a brief statement of the duties and functions of such individual as such officer.

(3) An accounting, in such form and detail as the Attorney General shall by regulations prescribe, of all moneys received and expended (including the sources from which received and the purposes for which expended) by the organization during the period of twelve full calendar months next preceding the filing of such statement.

(4) In the case of a Communist-action organization, the name and last-known address of each individual who was a member of the organization at any time during the period of twelve full calendar months preceding the filing of such statement.

(5) In the case of any officer or member whose name is required to be shown in such statement, and who uses or has used or who is or has been known by more than one name, each name which such officer or member uses or has used or by which he is known or has been known.

(6) A listing, in such form and detail as the Attorney General shall by regulation prescribe, of all printing presses and machines including but not limited to rotary presses, flatbed cylinder presses, platen presses, lithographs, offsets, photo-offsets, mimeograph machines, multigraph machines, multilith machines, duplicating machines, ditto machines, linotype machines, intertype machines, monotype machines, and all other types of printing presses, typesetting machines or any mechanical devices used or intended to be used, or capable of being used to produce or publish printed matter or material, which are in the possession, custody, ownership, or control of the Communist-action

or Communist-front organization or its officers, members, affiliates, associates, group, or groups in which the Communist-action or Communist-front organization, its officers or members have an interest.<sup>6</sup>

(e) It shall be the duty of each organization registered under this section to file with the Attorney General on or before February 1 of the year following the year in which it registers, and on or before February 1 of each succeeding year, an annual report, prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the same information which by subsection (d) is required to be included in a registration statement, except that the information required with respect to the twelve-month period referred to in paragraph (2), (3), or (4) of such subsection shall, in such annual report, be given with respect to the calendar year preceding the February 1 on or before which such annual report must be filed.

(f)(1) It shall be the duty of each organization registered under this section to keep, in such manner and form as the Attorney General shall by regulations prescribe, accurate records and accounts of moneys received and expended (including the sources from which received and purposes for which expended) by such organization.

(2) It shall be the duty of each Communist-action organization registered under this section to keep, in such manner and form as the Attorney General shall by regulations prescribe, accurate records of the names and addresses of the members of such organization and of persons who actively participate in the activities of such organization.

(g) It shall be the duty of the Attorney General to send to each individual listed in any registration statement or annual report, filed under this section, as an officer or mem-

<sup>6</sup> Added by P. L. 557, 83d Cong., 2d Sess., 68 Stat. 586.

ber of the organization in respect of which such registration statement or annual report was filed, a notification in writing that such individual is so listed; and such notification shall be sent at the earliest practicable time after the filing of such registration statement or annual report. Upon written request of any individual so notified who denies that he holds any office or membership (as the case may be) in such organization, the Attorney General shall forthwith initiate and conclude at the earliest practicable time an appropriate investigation to determine the truth or falsity of such denial, and, if the Attorney General shall be satisfied that such denial is correct, he shall thereupon strike from such registration statement or annual report the name of such individual. If the Attorney General shall decline or fail to strike the name of such individual from such registration statement or annual report within five months after receipt of such written request, such individual may file with the Board a petition for relief pursuant to section 13(b) of this title.

(h) In the case of failure on the part of any organization to register or to file any registration statement or annual report as required by this section, it shall be the duty of the executive officer (or individual performing the ordinary and usual duties of an executive officer) and of the secretary (or individual performing the ordinary and usual duties of a secretary) of such organization, and of such officer or officers of such organization as the Attorney General shall by regulations prescribe, to register for such organization, to file such registration statement, or to file such annual report, as the case may be.

#### REGISTRATION OF MEMBERS OF COMMUNIST-ACTION ORGANIZATIONS

SEC. 8. (a) Any individual who is or becomes a member of any organization concerning which (1) there is in effect a final order of the Board requiring such organization to

register under section 7(a) of this title as a Communist-action organization, (2) more than thirty days have elapsed since such order has become final, and (3) such organization is not registered under section 7 of this title as a Communist-action organization, shall within sixty days after said order has become final, or within thirty days after becoming a member of such organization, whichever is later, register with the Attorney General as a member of such organization.

(b) Each individual who is or becomes a member of any organization which he knows to be registered as a Communist-action organization under section 7(a) of this title, but to have failed to include his name upon the list of members thereof filed with the Attorney General, pursuant to the provisions of subsections (d) and (e) of section 7 of this title, shall, within sixty days after he shall have obtained such knowledge, register with the Attorney General as a member of such organization.

(c) The registration made by any individual under subsection (a) or (b) of this section shall be accompanied by a registration statement to be prepared and filed in such manner and form, and containing such information, as the Attorney General shall by regulations prescribe.

#### KEEPING OF REGISTERS; PUBLIC INSPECTION; REPORTS TO PRESIDENT AND CONGRESS

SEC. 9. (a) The Attorney General shall keep and maintain separately in the Department of Justice—

(1) a "Register of Communist-Action Organizations", which shall include (A) the names and addresses of all Communist-action organizations registered under section 7, (B) the registration statements and annual reports filed by such organizations thereunder, and (C) the registration statements filed by individuals under section 8; and

(2) a "Register of Communist-Front Organizations", which shall include (A) the names and addresses of all Communist-front organizations registered under section 7, and (B) the registration statements and annual reports filed by such organizations thereunder.

(b) Such registers shall be kept and maintained in such manner as to be open for public inspection: *Provided*, That the Attorney General shall not make public the name of any individual listed in either such register as an officer or member of any Communist organization until sixty days shall have elapsed after the transmittal of the notification required by section 7(g) to be sent to such individual, and if prior to the end of such period such individual shall make written request to the Attorney General for the removal of his name from any such list, the Attorney General shall not make public the name of such individual until six months shall have elapsed after receipt of such request by the Attorney General, or until thirty days shall have elapsed after the Attorney General shall have denied such request and shall have transmitted to such individual notice of such denial, whichever is earlier.

(c) The Attorney General shall submit to the President and to the Congress on or before June 1 of each year (and at any other time when requested by either House by resolution) a report with respect to the carrying out of the provisions of this title, including the names and addresses of the organizations listed in such registers and (except to the extent prohibited by subsection (b) of this section) the names and addresses of the individuals listed as members of such organizations.

(d) Upon the registration of each Communist organization under the provisions of this title, the Attorney General shall publish in the Federal Register the fact that such organization has registered as a Communist-action organization, or as a Communist-front organization, as the case

may be, and the publication thereof shall constitute notice to all members of such organization that such organization has so registered.

## USE OF THE MAILS AND INSTRUMENTALITIES OF INTERSTATE OR FOREIGN COMMERCE

SEC. 10. It shall be unlawful for any organization which is registered under section 7, or for any organization with respect to which there is in effect a final order of the Board requiring it to register under section 7, or determining that it is a Communist-infiltrated organization,<sup>7</sup> or for any person acting for or on behalf of any such organization—

(1) to transmit or cause to be transmitted, through the United States mails or by any means or instrumentality of interstate or foreign commerce, any publication which is intended to be, or which it is reasonable to believe is intended to be, circulated or disseminated among two or more persons, unless such publication, and any envelope, wrapper, or other container in which it is mailed or otherwise circulated or transmitted, bears the following, printed in such manner as may be provided in regulations prescribed by the Attorney General, with the name of the organization appearing in lieu of the blank: "Disseminated by \_\_\_\_\_, a Communist organization"; or

(2) to broadcast or cause to be broadcast any matter over any radio or television station in the United States, unless such matter is preceded by the following statement, with the name of the organization being stated in place of the blank: "The following program is sponsored by \_\_\_\_\_, a Communist organization".

<sup>7</sup> Reference to Communist-infiltrated organizations added by sec. 8(a) of the Communist Control Act of 1954, 68 Stat. 778.

## DENIAL OF TAX DEDUCTIONS AND EXEMPTIONS

SEC. 11. (a) Notwithstanding any other provisions of law, no deduction for Federal income-tax purposes shall be allowed in the case of a contribution to or for the use of any organization if at the time of the making of such contribution (1) such organization is registered under section 7, or (2) there is in effect a final order of the Board requiring such organization to register under section 7 or determining that it is a Communist-infiltrated organization.<sup>8</sup>

(b) No organization shall be entitled to exemption from Federal income tax, under section 101 of the Internal Revenue Code, for any taxable year if at any time during such taxable year (1) such organization is registered under section 7; or (2) there is in effect a final order of the Board requiring such organization to register under section 7 or determining that it is a Communist-infiltrated organization.<sup>9</sup>

## SUBVERSIVE ACTIVITIES CONTROL BOARD

SEC. 12. (a) There is hereby established a board, to be known as the Subversive Activities Control Board, which shall be composed of five members, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three members of the Board shall be members of the same political party. Two of the original members shall be appointed for a term of one year, two for a term of two years, and one for a term of three years, but their successors shall be appointed for terms of three years each, except that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board.

<sup>8</sup> See footnote 7.

<sup>9</sup> See footnote 7.

Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) Any vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and three members of the Board shall, at all times, constitute a quorum. The Board shall have an official seal which shall be judicially noticed.

(c) The Board shall at the close of each fiscal year make a report in writing to the Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees of the Board, and an account of all moneys it has disbursed.

(d) Each member of the Board shall receive a salary of \$15,000 a year,<sup>10</sup> shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment.

(e) It shall be the duty of the Board—

(1) upon application made by the Attorney General under section 13(a) of this title, or by any organization under section 13(b) of this title, to determine whether any organization is a "Communist-action organization" within the meaning of paragraph (3) of section 3 of this title, or a "Communist-front organization" within the meaning of paragraph (4) of section 3 of this title; and

(2) upon application made by the Attorney General under section 13(a) of this title, or by any individual under section 13(b) of this title, to determine whether any individual is a member of any Communist-action organization registered, or by final order of the Board required to be registered, under section 7(a) of this title; and

<sup>10</sup> Originally \$12,500. Raised to present figure by Act of July 12, 1952. 66 Stat. 590, 50 U. S. C. Supp. 791(d).

(3) upon any application made under subsection (a) or subsection (b) of section 13A of this title, to determine whether any organization is a Communist-infiltrated organization.<sup>11</sup>

(f) Subject to the civil-service laws and Classification Act of 1949, the Board may appoint and fix the compensation of a chief clerk and such examiners and other personnel as may be necessary for the performance of its functions.

(g) The Board may make such rules and regulations, not inconsistent with the provisions of this title, as may be necessary for the performance of its duties.

(h) There are hereby authorized to be appropriated to the Board such sums as may be necessary to carry out its functions.

#### REGISTRATION PROCEEDINGS BEFORE BOARD <sup>12</sup>

SEC. 13. (a) Whenever the Attorney General shall have reason to believe that any organization which has not registered under subsection (a) or subsection (b) of section 7 of this title is in fact an organization of a kind required to be registered under such subsection, or that any individual who has not registered under section 8 of this title is in fact required to register under such section, he shall file with the Board and serve upon such organization or individual a petition for an order requiring such organization or individual to register pursuant to such subsection or section, as the case may be. Each such petition shall be verified under oath, and shall contain a statement of the facts upon which the Attorney General relies in support of his prayer for the issuance of such order.

<sup>11</sup> Added by sec. 9(a) of the Communist Control Act of 1954, 68 Stat. 778.

<sup>12</sup> "Registration" added by sec. 9(b) of the Communist Control Act of 1954, 68 Stat. 778.

(b) Any organization registered under subsection (a) or subsection (b) of section 7 of this title, and any individual registered under section 8 of this title, may, not oftener than once in each calendar year, make application to the Attorney General for the cancellation of such registration and (in the case of such organization) for relief from obligation to make further annual reports. Within sixty days after the denial of any such application by the Attorney General, the organization or individual concerned may file with the Board and serve upon the Attorney General a petition for an order requiring the cancellation of such registration and (in the case of such organization) relieving such organization of obligation to make further annual reports. Any individual authorized by section 7(g) of this title to file a petition for relief may file with the Board and serve upon the Attorney General a petition for an order requiring the Attorney General to strike his name from the registration statement or annual report upon which it appears.

(c) Upon the filing of any petition pursuant to subsection (a) or subsection (b) of this section, the Board (or any member thereof or any examiner designated thereby) may hold hearings, administer oaths and affirmations, may examine witnesses and receive evidence at any place in the United States, and may require by subpoena the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records deemed relevant, to the matter under inquiry. Subpoenas may be signed and issued by any member of the Board or any duly authorized examiner. Subpoenas shall be issued on behalf of the organization or the individual who is a party to the proceeding upon request and upon a statement or showing of general relevance and reasonable scope of the evidence sought. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States at any designated place of hearing. Witnesses summoned shall be

paid the same fees and mileage paid witnesses in the district courts of the United States. In case of disobedience to a subpoena, the Board may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring such person to appear (and to produce documentary evidence if so ordered) and give evidence relating to the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. No person shall be held liable in any action in any court, State or Federal, for any damages resulting from (1) his production of any documentary evidence in any proceeding before the Board if he is required, by a subpoena issued under this subsection, to produce the evidence; or (2) any statement under oath he makes in answer to a question he is asked while testifying before the Board in response to a subpoena issued under this subsection, if the statement is pertinent to the question.

(d)(1) All hearings conducted under this section shall be public. Each party to such proceeding shall have the right to present its case with the assistance of counsel, to offer oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. An accurate stenographic record shall be taken of the testimony of each witness, and a transcript of such testimony shall be filed in the office of the Board.

(2) Where an organization or individual declines or fails to appear at a hearing accorded to such organization or individual by the Board pursuant to this section, the

Board may, without further proceedings and without the introduction of any evidence, enter an order requiring such organization or individual to register or denying the application of such organization or individual, as the case may be. Where in the course of any hearing before the Board or any examiner thereof a party or counsel is guilty of misbehavior which obstructs the hearing, such party or counsel may be excluded from further participation in the hearing.

(e). In determining whether any organization is a "Communist-action organization", the Board shall take into consideration—

(1) the extent to which its policies are formulated and carried out and its activities performed, pursuant to directives or to effectuate the policies of the foreign government or foreign organization in which is vested, or under the domination or control of which is exercised, the direction and control of the world Communist movement referred to in section 2 of this title; and

(2) the extent to which its views and policies do not deviate from those of such foreign government or foreign organization; and

(3) the extent to which it receives financial or other aid, directly or indirectly, from or at the direction of such foreign government or foreign organization; and

(4) the extent to which it sends members or representatives to any foreign country for instruction or training in the principles, policies, strategy, or tactics of such world Communist movement; and

(5) the extent to which it reports to such foreign government or foreign organization or to its representatives; and

(6) the extent to which its principal leaders or a substantial number of its members are subject to or

recognize the disciplinary power of such foreign government or foreign organization or its representatives; and

(7) the extent to which, for the purpose of concealing foreign direction, domination, or control, or of expediting or promoting its objectives, (i) it fails to disclose, or resists efforts to obtain information as to its membership (by keeping membership lists in code, by instructing members to refuse to acknowledge membership, or by any other method); (ii) its members refuse to acknowledge membership therein; (iii) it fails to disclose, or resists efforts to obtain information as to, records other than membership lists; (iv) its meetings are secret; and (v) it otherwise operates on a secret basis; and

(8) the extent to which its principal leaders or a substantial number of its members consider the allegiance they owe to the United States as subordinate to their obligations to such foreign government or foreign organization.

(f) In determining whether any organization is a "Communist front organization", the Board shall take into consideration—

(1) the extent to which persons who are active in its management, direction, or supervision, whether or not holding office therein, are active in the management, direction, or supervision of, or as representatives of, any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and

(2) the extent to which its support, financial or otherwise, is derived from any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and

(3) the extent to which its funds, resources, or personnel are used to further or promote the objectives of any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and

(4) the extent to which the positions taken or advanced by it from time to time on matters of policy do not deviate from those of any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2.

(g) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

(1) that an organization is a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such organization an order requiring such organization to register as such under section 7 of this title; or

(2) that an individual is a member of a Communist-action organization (including an organization required by final order of the Board to register under section 7(a)), it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such individual an order requiring him to register as such under section 8 of this title.

(h) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

(1) that an organization is not a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an

order denying his petition for an order requiring such organization to register as such under section 7 of this title; and send a copy of such order, to such organization; or

(2) that an individual is not a member of any Communist-action organization, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order denying his petition for an order requiring such individual to register as such member under section 8 of this title; and send a copy of such order to such individual.

(i) If, after hearing upon a petition filed under subsection (b) of this section, the Board determines—

(1) ~~that~~ an organization is not a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order requiring him to cancel the registration of such organization and relieve it from the requirement of further annual reports; and send a copy of such order to such organization; or

(2) that an individual is not a member of any Communist-action organization, or (in the case of an individual listed as an officer of a Communist-front organization) that an individual is not an officer of a Communist-front organization, it shall make a report in writing in which it shall state its findings as to the facts; issue and cause to be served upon the Attorney General an order requiring him to (A) strike the name of such individual from the registration statement or annual report upon which it appears or (B) cancel the registration of such individual under section 8, as may be appropriate; and send a copy of such order to such individual.

(j) If, after hearing upon a petition filed under subsection (b) of this section, the Board determines—

(1) that an organization is a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such organization an order denying its petition for the cancellation of its registration and for relief from the requirement of further annual reports; or

(2) that an individual is a member of a Communist-action organization, or (in the case of an individual listed as a officer of a Communist-front organization) that an individual is an officer of a Communist-front organization, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such individual an order denying his petition for an order requiring the Attorney General (A) to strike his name from any registration statement or annual report on which it appears or (B) to cancel the registration of such individual under section 8, as the case may be.

(k) When any order of the Board requiring registration of a Communist organization becomes final under the provisions of section 14(b) of this title, the Board shall publish in the Federal Register the fact that such order has become final, and publication thereof shall constitute notice to all members of such organization that such order has become final.

## PROCEEDINGS WITH RESPECT TO COMMUNIST-INFILTRATED ORGANIZATIONS

SEC. 13A.<sup>13</sup> (a) Whenever the Attorney General has reason to believe that any organization is a Communist-infiltrated organization, he may file with the Board and serve upon such organization a petition for a determination that such organization is a Communist-infiltrated organization. In any proceeding so instituted, two or more affiliated organizations may be named as joint respondents. Whenever any such petition is accompanied by a certificate of the Attorney General to the effect that the proceeding so instituted is one of exceptional public importance, such proceeding shall be set for hearing at the earliest possible time and all proceedings therein before the Board or any court shall be expedited to the greatest practicable extent.

(b) Any organization which has been determined under this section to be a Communist-infiltrated organization may, within six months after such determination, file with the Board and serve upon the Attorney General a petition for a determination that such organization no longer is a Communist-infiltrated organization.

(c) Each such petition shall be verified under oath, and shall contain a statement of the facts relied upon in support thereof. Upon the filing of any such petition, the Board shall serve upon each party to such proceeding a notice specifying the time and place for hearing upon such petition. No such hearing shall be conducted within twenty days after the service of such notice.

(d) The provisions of subsections (c) and (d) of section 13 shall apply to hearings conducted under this section, except that upon the failure of any organization named as a party in any petition filed by or duly served

<sup>13</sup> Added by sec. 10 of the Communist Control Act of 1954, 68 Stat. 778.

upon it pursuant to this section to appear at any hearing upon such petition, the Board may conduct such hearing in the absence of such organization and may enter such order under this section as the Board shall determine to be warranted by evidence presented at such hearing.

(e) In determining whether any organization is a Communist-infiltrated organization, the Board shall consider—

(1) to what extent, if any, the effective management of the affairs of such organization is conducted by one or more individuals who are, or within two years have been, (A) members, agents, or representatives of any Communist organization, and Communist foreign government, or the world Communist movement referred to in section 2 of this title, with knowledge of the nature and purpose thereof, or (B) engaged in giving aid or support to any such organization, government, or movement with knowledge of the nature and purpose thereof;

(2) to what extent, if any, the policies of such organization are, or within three years have been, formulated and carried out pursuant to the direction or advice of any member, agent, or representative of any such organization, government, or movement;

(3) to what extent, if any, the personnel and resources of such organization are, or within three years have been, used to further or promote the objectives of any such Communist organization, government, or movement;

(4) to what extent, if any, such organization within three years has received from, or furnished to or for the use of, any such Communist organization, government, or movement any funds or other material assistance;

(5) to what extent, if any, such organization is, or within three years has been, affiliated in any way with

any such Communist organization, government, or movement;

(6) to what extent, if any, the affiliation of such organization, or of any individual or individuals who are members thereof or who manage its affairs, with any such Communist organization, government, or movement is concealed from or is not disclosed to the membership of such organization; and

(7) to what extent, if any, such organization or any of its members or managers are, or within three years have been, knowingly engaged—

(A) in any conduct punishable under section 4 or 15 of this Act or under chapter 37, 105, or 115 of title 18 of the United States Code; or

(B) with intent to impair the military strength of the United States or its industrial capacity to furnish logistical or other support required by its armed forces, in any activity resulting in or contributing to any such impairment.

(f) After hearing upon any petition filed under this section, the Board shall (1) make a report in writing in which it shall state its findings as to the facts and its conclusions with respect to the issues presented by such petition, (2) enter its order granting or denying the determination sought by such petition, and (3) serve upon each party to the proceeding a copy of such order. Any order granting any determination on the question whether any organization is a Communist-infiltrated organization shall become final as provided in section 14(b) of this Act.

(g) When any order has been entered by the Board under this section with respect to any labor organization or employer (as these terms are defined by section 2 of the National Labor Relations Act, as amended, and which are organizations within the meaning of section 3 of the

Subversive Activities Control Act of 1950), the Board shall serve a true and correct copy of such order upon the National Labor Relations Board and shall publish in the Federal Register a statement of the substance of such order and its effective date. 92

(h) When there is in effect a final order of the Board determining that any such labor organization is a Communist action organization, a Communist-front organization, or a Communist-infiltrated organization, such labor organization shall be ineligible to—

(1) act as representative of any employee within the meaning or for the purposes of section 7 of the National Labor Relations Act, as amended (29 U. S. C. 157);

(2) serve as an exclusive representative of employees of any bargaining unit under section 9 of such Act, as amended (29 U. S. C. 159);

(3) make, or obtain any hearing upon, any charge under section 10 of such Act (29 U. S. C. 160); or

(4) exercise any other right or privilege, or receive any other benefit, substantive or procedural, provided by such Act for labor organizations.

(i) When an order of the Board determining that any such labor organization is a Communist-infiltrated organization has become final, and such labor organization therefore has been certified under the National Labor Relations Act, as amended, as a representative of employees in any bargaining unit—

(1) a question of representation affecting commerce, within the meaning of section 9(e) of such Act, shall be deemed to exist with respect to such bargaining unit; and

(2) the National Labor Relations Board, upon petition of not less than 20 per centum of the employees

in such bargaining unit or any person or persons acting in their behalf, shall under section 9 of such Act (notwithstanding any limitation of time contained therein) direct elections in such bargaining unit or any subdivision thereof (A) for the selection of a representative thereof for collective bargaining purposes, and (B) to determine whether the employees thereof desire to rescind any authority previously granted to such labor organization to enter into any agreement with their employer pursuant to section 8(a) (3)(ii) of such Act.

(j) When there is in effect a final order of the Board determining that any such employer is a Communist-infiltrated organization, such employer shall be ineligible to—

(1) file any petition for an election under section 9 of the National Labor Relations Act, as amended (29 U. S. C. 157), or participate in any proceeding under such section; or

(2) make or obtain any hearing upon any charge under section 10 of such Act (29 U. S. C. 160); or

(3) exercise any other right or privilege or receive any other benefit, substantive or procedural, provided by such Act for employers.

#### JUDICIAL REVIEW

SEC. 14. (a) The party aggrieved by any order entered by the Board under subsection (g), (h), (i), or (j) of section 13, or subsection <sup>14</sup> (f) of section 13A, may obtain a review of such order by filing in the United States Court of Appeals for the District of Columbia, within sixty days from the date of service upon it of such order, a written petition praying that the order of the Board be

<sup>14</sup> Matter between commas added by section 11 of the Communist Control Act of 1954, 68 Stat. 780.

set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the Board shall certify and file in the court a transcript of the entire record in the proceeding, including all evidence taken and the report and order of the Board. Thereupon the court shall have jurisdiction of the proceeding and shall have power to affirm or set aside the order of the Board; but the court may in its discretion and upon its own motion transfer any action so commenced to the United States Court of Appeals for the circuit wherein the petitioner resides. The findings of the Board as to the facts, if supported by the preponderance of the evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material, the court may order such additional evidence to be taken before the Board and to be adduced upon the proceeding in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by the preponderance of the evidence shall be conclusive, and its recommendations, if any, with respect to action in the matter under consideration. If the court shall set aside an order issued under subsection (j) of section 13 it may, in the case of an organization, enter a judgment canceling the registration of such organization and relieving it from the requirement of further annual reports, or in the case of an individual, enter a judgment requiring the Attorney General (A) to strike the name of such individual from the registration statement or annual report on which it appears, or (B) cancel the registration of such individual under section 8, as may be appropriate. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in title 28, United States Code, section 1254.

(b) Any order of the Board issued under section 13, or subsection (f) of section 13A,<sup>15</sup> shall become final—

(1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

(2) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Board has been affirmed or the petition for review dismissed by a United States Court of Appeals, and no petition for certiorari has been duly filed; or

(3) upon the denial of a petition for certiorari, if the order of the Board has been affirmed or the petition for review dismissed by a United States Court of Appeals; or

(4) upon the expiration of ten days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Board be affirmed or the petition for review dismissed.

#### PENALTIES

SEC. 15. (a) If there is in effect with respect to any organization or individual a final order of the Board requiring registration under section 7 or section 8 of this title—

(1) such organization shall, upon conviction of failure to register, to file any registration statement or annual report, or to keep records as required by section 7, to be punished for each such offense by a fine of not more than \$10,000, and

(2) each individual having a duty under subsection (h) of section 7 to register or to file any registration statement or annual report on behalf of such organiza-

<sup>15</sup> See footnote 14.

tion, and each individual having a duty to register under section 8, shall, upon conviction of failure to so register or to file any such registration statement or annual report, be punished for each such offense by a fine of not more than \$10,000, or imprisonment for not more than five years, or by both such fine and imprisonment.

For the purposes of this subsection, each day of failure to register, whether on the part of the organization or any individual, shall constitute a separate offense.

(b) Any individual who, in a registration statement or annual report filed under section 7 or section 8, willfully makes any false statement or willfully omits to state any fact which is required to be stated, or which is necessary to make the statements made or information given not misleading, shall upon conviction thereof be punished for each such offense by a fine of not more than \$10,000, or by imprisonment for not more than five years, or by both such fine and imprisonment. For the purposes of this subsection—

(1) each false statement willfully made, and each willful omission to state any fact which is required to be stated, or which is necessary to make the statements made or information given not misleading, shall constitute a separate offense; and

(2) each listing of the name or address of any one individual shall be deemed to be a separate statement.

(c) Any organization which violates any provision of section 10 of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than \$10,000. Any individual who violates any provision of section 5, 6, or 10 of this title shall, upon conviction thereof, be punished for each such violation by a fine of not more than \$10,000 or by imprisonment for not more than five years, or by both such fine and imprisonment.

## APPLICABILITY OF ADMINISTRATIVE PROCEDURE ACT

SEC. 16. Nothing in this title shall be held to make the provisions of the Administrative Procedure Act inapplicable to the exercise of functions, or the conduct of proceedings, by the Board under this title.

## EXISTING CRIMINAL STATUTES

SEC. 17. The foregoing provisions of this title shall be construed as being in addition to and not in modification of existing criminal statutes.

. . . . .

## 2. Immigration and Nationality Act

Pertinent provisions of sections 22 and 25 of the Subversive Activities Control Act have been carried forward in the Immigration and Nationality Act; 66 Stat. 163, adopted June 27, 1952, 8 U. S. C., secs. 1182, 1251, 1424, 1451, as follows:

SEC. 212. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

. . . . .

(28) Aliens who are, or at any time have been, members of any of the following classes:

. . . . .

(E) Aliens not within any of the other provisions, of this paragraph, who are members of or affiliated with any organization during the time it is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950, unless such aliens establish that they did not have knowledge or reason to believe at the time they became members of or affiliated with such an organi-

zation (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist organization.

SEC. 241. (a) Any alien in the United States (including any alien-crewman) shall, upon the order of the Attorney General, be deported who—

\* \* \* \* \*

(6) is or at any time has been, after entry, a member of any of the following classes of aliens:

\* \* \* \* \*

(E) Aliens not within any of the other provisions of this paragraph, who are members of or affiliated with any organization during the time it is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950, unless such aliens establish that they did not have knowledge or reason to believe at the time they became members of or affiliated with such organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist organization.

SEC. 313. (a) Notwithstanding the provisions of section 405(b), no person shall hereafter be naturalized as a citizen of the United States—

\* \* \* \* \*

(2) . . . (G) who, regardless of whether he is within any of the other provisions of this section, is a member of or affiliated with any Communist-action organization during the time it is registered or required to be registered under the provisions of section 7 of the Subversive Activities Control Act of 1950; or (H) who, regardless of whether he is within any of the other provisions of this section, is a member of or

affiliated with any Communist-front organization during the time it is registered or required to be registered under section 7 of the Subversive Activities Control Act of 1950, unless such alien establishes that he did not have knowledge or reason to believe at the time he became a member of or affiliated with such an organization (and did not thereafter and prior to the date upon which such organization was so registered or so required to be registered have such knowledge or reason to believe) that such organization was a Communist-front organization.

SEC. 340. \* \* \* (c) If a person who shall have been naturalized after the effective date of this Act<sup>16</sup> shall within five years next following such naturalization become a member of or affiliated with any organization, membership in or affiliation with which at the time of naturalization would have precluded such person from naturalization under the provisions of section 313, it shall be considered prima facie evidence that such person was not attached to the principles of the Constitution of the United States and was not well disposed to the good order and happiness of the United States at the time of naturalization, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively.

<sup>16</sup> The introductory clause of section 25(d) of the Act reads "If a person who shall have been naturalized after January 1, 1951 \* \* \*"

**V. The original "recess" appointments of the members of the Board present a constitutional question as to their validity which has not been, but should be, determined by this Court.**

As we shall show, the presidential "recess" appointments of the five original members of the Board, on October 23, 1950, were invalid because made in violation of art. 2, sec. 2, cl. 3 of the Constitution. There was, therefore, no lawfully constituted Board prior to August 9, 1951, when the Senate confirmed three of the appointees. Consequently, the acts of the alleged Board members prior to that date in denying petitioner's pre-hearing motions (R. 1, n. 1) and in conducting the hearing were nullities.

The facts with reference to the appointments of the Board members were as follows: Congress passed the Act over the President's veto on September 23, 1950 and adjourned on the same day pursuant to a concurrent resolution that it reconvene on November 27, 1950. The President made the "recess" appointments of the alleged Board members on October 23, 1950. On November 27, 1950, he transmitted nominations of these persons to the Senate. On January 2, 1951 the 81st Congress adjourned *sine die* without acting on the nominations. The nominations were resubmitted to the Senate of the 82nd Congress which took no action upon them until August 9, 1951, when it confirmed three of the appointees (Op. 47).<sup>19</sup>

Art. 2, sec. 2, cl. 3 provides:

"The President shall have Power to fill up all vacancies that may happen during the Recess of the Senate by granting Commissions which shall expire at the end of their next Session."

<sup>19</sup> One of the other appointees had previously resigned and the nomination of the fifth was never acted upon by the Senate.

The term "vacancies" as used in this clause refers to those occurring by reason of death, resignation, promotion or removal. No vacancy "happens" in the constitutional sense when an office is newly created by law. Moreover, even if the vacancies on the Board "happened," they arose simultaneously with the passage of the Act while the Senate was in session and therefore did not happen "during the Recess." *Schenck v. Peay*, 21 Fed. Cas. 672; *People v. Forquer*, 1 Ill. 104; Story, *Commentaries on the Constitution*, sec. 1559; Cooley, *Principles of Constitutional Law*, p. 104; Morganston, *The Appointing and Removal Power of the President of the United States*, Sen. Doc. 172, 70th Cong., 2d Sess., p. 136.<sup>80</sup>

Furthermore, "the Recess," referred to in art. 2, sec. 2, cl. 2, means the recess *sine die* following an annual or extraordinary session of Congress. It does not include the period following an adjournment to a day certain such as the period of the adjournment of the 81st Congress from September 23 to November 27, 1950. 23 Ops. A.G. 599 (by Attorney General Knox).

Finally, if the adjournment of Congress from September 23 to November 27, 1950 was in fact "the Recess," then the sitting of the Senate that commenced on the latter date must have been its "next Session." *Case of the District Attorney*, 7 Fed. Cas. 731, 744. Consequently, the appointments expired on January 2, 1951 when the "next session" ended upon the *sine die* adjournment of the 81st Congress.

The subsequent confirmation of three of the appointments did not cure their original invalidity but simply gave the appointees title to their offices from the date of confirmation. *United States v. Kirkpatrick*, 6 U. S. 244, 248.

<sup>80</sup> Two opinions of the Attorney General hold that the President has no authority to make recess appointments to newly created offices. 2 Ops. A. G. 333, 4 Ops. A. G. 362. Three opinions hold that he has such authority. 12 Ops. A. G. 455; 18 Ops. A. G. 28; 19 Ops. A. G. 261.

Petitioner asserted the invalidity of the appointments at the inception of this proceeding by a motion addressed to the Board (Tr. 61) and in an injunction proceeding in the District Court. *Communist Party of the United States of America v. McGrath*, 96 F. Supp. 47, 48. Both the Board (Tr. 113) and the District Court (at 47) denied relief on the grounds of prematurity, holding that the issue should properly await determination upon review of the Board's order.<sup>81</sup>

The court below by-passed the constitutional questions presented by the "recess" appointments on the grounds (1) that the effect of any invalidity was "minimal" because most of the hearing occurred after confirmation, and (2) that in any event the appointees can be regarded as trial examiners (Op. 48).

However, the effect of the invalidity of the appointments cannot be measured by the relative amount of testimony taken before and after confirmation. The court disregarded the fact that key pre-trial motions were denied by the usurpers (Tr. 113-17), who also made precedent-setting rulings on the admissibility of evidence at the inception of the hearing.

The court's suggestion that the unconfirmed appointees can be regarded as trial examiners is palpably untenable in the face of the provisions for the appointment, tenure, compensation and assignment to cases of these officers prescribed by Section 11 of the Administrative Procedure Act (5 U. S. C. 1010) and made applicable to this proceeding by Section 16 of the Act.

The effect of the judicial denials of petitioner's initial challenge of the appointments as premature and of its renewed challenge as tardy is to deprive litigants of any rem-

<sup>81</sup> Petitioner dismissed the injunction proceeding after this Court had denied its application for a stay of the proceedings before the Board pending an appeal from the order of the statutory court denying an injunction (340 U. S. 950).

edy against usurpations of administrative office. We submit that the constitutional questions presented are important, novel and appropriately raised <sup>82</sup> and should be reviewed by this Court.

### CONCLUSION

This case presents constitutional questions of the utmost importance to the future of the nation. Moreover, the decision below erroneously interprets and applies the Act and contravenes fundamental and long-established principles of law. All of the questions presented demand review by this Court. The writ of certiorari should be granted.

Respectfully submitted,

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<sup>82</sup> The validity of a recess appointment to an office newly created by Congress has been before this Court in only one case. There, the question was raised by habeas corpus, and the matter was disposed of on the ground that title to office cannot be attacked collaterally. *Ex Parte Ward*, 173 U. S. 452.

## APPENDIX A

### The Judgment of the Court Below.

#### UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

OCTOBER TERM, 1954

No. 11,850

COMMUNIST PARTY OF THE UNITED STATES  
OF AMERICA,

Petitioner,

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD,

Respondent.

#### ON PETITION FOR REVIEW OF ORDER OF THE SUBVERSIVE ACTIVITIES CONTROL BOARD

Before: PRETTYMAN, BAZELON, and DANAHER,  
*Circuit Judges.*

#### JUDGMENT AND DECREE

This case came on to be heard on the transcript of the record from the Subversive Activities Control Board, and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by this Court that the order of the Subversive Activities Control Board on review herein be, and it is hereby, affirmed.

Dated: December 23, 1954.

Per CIRCUIT JUDGE PRETTYMAN.

Separate dissenting opinion by Circuit Judge Bazelon.

## APPENDIX B—STATUTES INVOLVED

### 1. Subversive Activities Control Act.

The Internal Security Act of 1950, 64 Stat. 987, 50 U. S. C. 781 ff., as amended, provides in part as follows:

#### AN ACT

To protect the United States against certain un-American and subversive activities by requiring registration of Communist organizations, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That this Act may be cited as the "Internal Security Act of 1950".

### TITLE I—SUBVERSIVE ACTIVITIES CONTROL

SECTION 1. (a) This title may be cited as the "Subversive Activities Control Act of 1950."

(b) Nothing in this Act shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated hereunder having that effect.

#### NECESSITY FOR LEGISLATION

SEC. 2. As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress hereby finds that—

(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement

whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.

(2) The establishment of a totalitarian dictatorship in any country results in the suppression of all opposition to the party in power, the subordination of the rights of individuals to the state, the denial of fundamental rights and liberties which are characteristic of a representative form of government, such as freedom of speech, of the press, of assembly, and of religious worship, and results in the maintenance of control over the people through fear, terrorism, and brutality.

(3) The system of government known as a totalitarian dictatorship is characterized by the existence of a single political party, organized on a dictatorial basis, and by substantial identity between such party and its policies and the government and governmental policies of the country in which it exists.

(4) The direction and control of the world Communist movement is vested in and exercised by the Communist dictatorship of a foreign country.

(5) The Communist dictatorship of such foreign country, in exercising such direction and control and in furthering the purposes of the world Communist movement, establishes or causes the establishment of, and utilizes, in various countries, action organizations which are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country.

(6) The Communist action organizations so established and utilized in various countries, acting under such control, direction, and discipline, endeavor to carry out the objective of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship. Although such organizations usually designate themselves as political parties, they are in fact constituent elements of the world-wide Communist movement and promote the objectives of such movement by conspiratorial and coercive tactics, instead of through the democratic processes of a free elective system or through the freedom-preserving means employed by a political party which operates as an agency by which people govern themselves.

(7) In carrying on the activities referred to in paragraph (6), such Communist organizations in various countries are organized on a secret, conspiratorial basis and operate to a substantial extent through organizations, commonly known as "Communist fronts", which in most instances are created and maintained, or used, in such manner as to conceal the facts as to their true character and purposes and their membership. One result of this method of operation is that such affiliated organizations are able to obtain financial and other support from persons who would not extend such support if they knew the true purposes of, and the actual nature of the control and influence exerted upon, such "Communist fronts".

(8) Due to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to

country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement.

(9) In the United States those individuals who knowingly and willfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement.

(10) In pursuance of communism's stated objectives, the most powerful existing Communist dictatorship has, by the methods referred to above, already caused the establishment in numerous foreign countries of Communist totalitarian dictatorships, and threatens to establish similar dictatorships in still other countries.

(11) The agents of communism have devised clever and ruthless espionage and sabotage tactics which are carried out in many instances in form or manner successfully evasive of existing law.

(12) The Communist network in the United States is inspired and controlled in large part by foreign agents who are sent into the United States ostensibly as attaches of foreign legations, affiliates of international organizations, members of trading commissions, and in similar capacities, but who use their diplomatic or semidiplomatic status as a shield behind which to engage in activities prejudicial to the public security.

(13) There are, under our present immigration laws, numerous aliens who have been found to be deportable, many of whom are in the subversive, criminal, or immoral classes who are free to roam the country at will without supervision or control.

(14) One device for infiltration by Communists is by procuring naturalization for disloyal aliens who

use their citizenship as a badge for admission into the fabric of our society.

(15) The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible, of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparation by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such worldwide conspiracy and designed to prevent it from accomplishing its purpose in the United States.

#### • DEFINITIONS

SEC. 3. For the purposes of this title—

(1) The term "person" means an individual or an organization.

(2) The term "organization" means an organization, corporation, company, partnership, association, trust, foun-

dation, or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together for joint action on any subject or subjects.

(3) The term "Communist-action organization" means—

(a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title; and

(b) any section, branch, fraction, or cell of any organization defined in subparagraph (a) of this paragraph which has not complied with the registration requirements of this title.

(4) The term "Communist-front organization" means any organization in the United States (other than a Communist-action organization as defined in paragraph (3) of this section) which (A) is substantially directed, dominated, or controlled by a Communist-action organization, and (B) is primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement referred to in section 2 of this title.

(4A) The term "Communist-infiltrated organization" means any organization in the United States (other than a Communist-action organization or a Communist-front organization) which (A) is substantially directed, dominated, or controlled by an individual or individuals who are, or who within three years have been actively engaged in, giving aid or support to a Communist-action organization, a Communist foreign government, or the world Com-

munist movement referred to in section 2 of this title, and (B) is serving, or within three years has served, as a means for (i) the giving of aid or support to any ~~such~~ organization, government, or movement, or (ii) the impairment of the military strength of the United States or its industrial capacity to furnish logistical or other material support required by its Armed Forces: *Provided, however,* That any labor organization which is an affiliate in good standing of a national federation or other labor organization whose policies and activities have been directed to opposing Communist organizations, any Communist foreign government, or the world Communist movement, shall be presumed prima facie not to be a "Communist-infiltrated organization."<sup>1</sup>

(5) The term "Communist organization" means any Communist-action organization, Communist-front organization, or Communist-infiltrated organization.<sup>2</sup>

(6) The term "to contribute funds or services" includes the rendering of any personal service and the making of any gift, subscription, loan, advance, or deposit, of money or of anything of value, and also the making of any contract, promise, or agreement to contribute funds or services, whether or not legally enforceable.

(7) The term "facility" means any plant, factory or other manufacturing, producing or service establishment, airport, airport facility, vessel, pier, water-front facility, mine, railroad, public utility, laboratory, station, or other establishment or facility, or any part, division, or department of any of the foregoing. The term "defense facility" means any facility designated and proclaimed by the Secretary of Defense pursuant to section 5(b) of this title and

<sup>1</sup> Added by sec. 7(a) of the Communist Control Act of 1954. 68 Stat. 777.

<sup>2</sup> As amended by sec. 7(b) of the Communist Control Act of 1954. 68 Stat. 778.

included on the list published and currently in effect under such subsection, and which is in compliance with the provisions of such subsection respecting the posting of notice of such designation.

(8) The term "publication" means any circular, newspaper, periodical, pamphlet, book, letter, post card, leaflet, or other publication.

(9) The term "United States", when used in a geographical sense, includes the several States, Territories, and possessions of the United States, the District of Columbia, and the Canal Zone.

(10) The term "interstate or foreign commerce" means trade, traffic, commerce, transportation, or communication (A) between any State, Territory, or possession of the United States (including the Canal Zone), or the District of Columbia, and any place outside thereof; or (B) within any Territory or possession of the United States (including the Canal Zone), or within the District of Columbia.

(11) The term "Board" means the Subversive Activities Control Board created by section 12 of this title.

(12) The term "final order of the Board" means an order issued by the Board under section 13 of this title, which has become final as provided in section 14 of this title.

(13) The term "advocates" includes advises, recommends, furthers by overt act, and admits belief in; and the giving, loaning, or promising of support or of money or anything of value to be used for advocating any doctrine shall be deemed to constitute the advocating of such doctrine.

(14) The term "world communism" means a revolutionary movement, the purpose of which is to establish event-

ally a Communist totalitarian dictatorship in any or all the countries of the world through the medium of an internationally coordinated Communist movement.

(15) The terms "totalitarian dictatorship" and "totalitarianism" mean and refer to systems of government not representative in fact, characterized by (A) the existence of a single political party, organized on a dictatorial basis, with so close an identity between such party and its policies and the governmental policies of the country in which it exists, that the party and the government constitute an indistinguishable unit, and (B) the forcible suppression of opposition to such party.

(16) The term "doctrine" includes, but is not limited to, policies, practices, purposes, aims, or procedures.

(17) The giving, loaning, or promising of support or of money or any other thing of value for any purpose to any organization shall be conclusively presumed to constitute affiliation therewith; but nothing in this paragraph shall be construed as an exclusive definition of affiliation.

(18) "Advocating the economic, international, and governmental doctrines of world communism" means advocating the establishment of a totalitarian Communist dictatorship in any or all of the countries of the world through the medium of an internationally coordinated Communist movement.

(19) "Advocating the economic and governmental doctrines of any other form of totalitarianism" means advocating the establishment of totalitarianism (other than world communism) and includes, but is not limited to, advocating the economic and governmental doctrines of fascism and nazism.

# CERTAIN PROHIBITED ACTS

SEC. 4. (a) It shall be unlawful for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship, as defined in paragraph (15) of section 3 of this title, the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization, or foreign individual: *Provided, however,* That this subsection shall not apply to the proposal of a constitutional amendment.

(b) It shall be unlawful for any officer or employee of the United States or of any department or agency thereof, or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, to communicate in any manner or by any means, to any other person whom such officer or employee knows or has reason to believe to be an agent or representative of any foreign government or an officer or member of any Communist organization as defined in paragraph (5) of section 3 of this title, any information of a kind which shall have been classified by the President (or by the head of any such department, agency, or corporation with the approval of the President) as affecting the security of the United States, knowing or having reason to know that such information has been so classified, unless such officer or employee shall have been specifically authorized by the President, or by the head of the department, agency, or corporation by which this officer or employee is employed, to make such disclosure of such information.

(c) It shall be unlawful for any agent or representative of any foreign government, or any officer or member of any Communist organization as defined in paragraph (5) of section 3 of this title, knowingly to obtain or receive, or attempt to obtain or receive, directly or indirectly, from

### 3. The Communist Control Act of 1954

The Communist Control Act of 1954, 68 Stat. 775, 50 U. S. C. 481-44, provides in part as follows:

#### FINDINGS OF FACT

SEC. 2. The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchical chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately

must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed.

#### PROSCRIBED ORGANIZATIONS

SEC. 3. The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are hereby terminated: *Provided, however,* That nothing in this section shall be construed as amending the Internal Security Act of 1950, as amended.

SEC. 4. Whoever knowingly and willfully becomes or remains a member of (1) the Communist Party, or (2) any other organization having for one of its purposes or objectives the establishment, control conduct, seizure, or overthrow of the Government of the United States, or the government of any State or political subdivision thereof, by the use of force or violence, with knowledge of the pur-

pose or objective of such organization shall be subject to all the provisions and penalties of the Internal Security Act of 1950, as amended, as a member of a "Communist-action" organization.

(b) For the purposes of this section, the term "Communist Party" means the organization now known as the Communist Party of the United States of America, the Communist Party of any State or subdivision thereof, and any unit or subdivision of any such organization, whether or not any change is hereafter made in the name thereof.

SEC. 5. In determining membership or participation in the Communist Party or any other organization defined in this Act, or knowledge of the purpose or objective of such party or organization, the jury, under instructions from the court, shall consider evidence, if presented, as to whether the accused person:

(1) Has been listed to his knowledge as a member in any book or any of the lists, records, correspondence, or any other document of the organization;

(2) Has made financial contribution to the organization in dues, assessments, loans, or in any other form;

(3) Has made himself subject to the discipline of the organization in any form whatsoever;

(4) Has executed orders, plans, or directives of any kind of the organization;

(5) Has acted as an agent, courier, messenger, correspondent, organizer, or in any other capacity in behalf of the organization;

(6) Has conferred with officers or other members of the organization in behalf of any plan or enterprise of the organization;

(7) Has been accepted to his knowledge as an officer or member of the organization or as one to be called upon for services by other officers or members of the organization;

(8) Has written, spoken or in any other way communicated by signal, semaphore, sign, or in any other form of communication orders, directives, or plans of the organization;

(9) Has prepared documents, pamphlets, leaflets, books, or any other type of publication in behalf of the objectives and purposes of the organization;

(10) Has mailed, shipped, circulated, distributed, delivered, or in any other way sent or delivered to others material or propaganda of any kind in behalf of the organization;

(11) Has advised, counseled or in any other way imparted information, suggestions, recommendations to officers or members of the organization or to anyone else in behalf of the objectives of the organization;

(12) Has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes of the organization;

(13) Has in any other way participated in the activities, planning, actions, objectives, or purposes of the organization;

(14) The enumeration of the above subjects of evidence on membership or participation in the Communist Party or any other organization as above defined, shall not limit the inquiry into and consideration of any other subject of evidence on membership and participation as herein stated.

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SEC. 12. If any provision of this title or the application thereof to any person or circumstances is held invalid, the remainder of the title, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

<sup>17</sup> The omitted sections amend the Subversive Activities Control Act.